

# CHAPTER 6

## WRONGDOING

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Chapter 6 provides guidance regarding a wide range of topics related to wrongdoing, including:


- ▶ willful violations
- ▶ Office of Investigation (OI) investigations and reports
- ▶ referrals to the Department of Justice (DOJ)
- ▶ the enforcement process for discrimination cases
- ▶ discrimination for engaging in protected activities (DOL process)
- ▶ enforcement and administrative actions involving individuals

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### 6.1 Willful Violations

- a. A **willful violation** is one in which an NRC requirement has been breached through a voluntary and intentional action or lack of action other than a mistake or error.

 OI refers cases to DOJ when willful violations are substantiated by OI.


- b. Willful violations may result either from conduct which:

1. Is intentional or deliberate; or
2. Constitutes reckless or careless disregard or indifference as to whether a requirement will be violated.

 Notwithstanding the actual safety consequence of a willful violation, the Commission has taken the position that all willful violations are of particular concern because its regulatory programs are based on licensees and their employees and contractors acting with integrity and communicating with candor.

c. The basic elements of a **deliberate violation** are typically:

1. A requirement exists (a regulation, license condition or technical specification, order or statute);
2. A violation of the requirement has occurred;
3. The person's actions were voluntary, as opposed to inadvertent;
4. The person committing the violation knew a requirement existed, understood the requirement, and knew the requirement was applicable at the time; and
5. The person knew that his or her actions were contrary to the requirement.

 It is important to recognize that careless disregard is not a subset of deliberate conduct.

d. The elements of conduct which demonstrate **careless (or reckless) disregard** are typically:


1. A requirement exists (a regulation, license condition or technical specification, order or statute);
2. A violation of the requirement has occurred;
3. The person's actions were voluntary, as opposed to inadvertent, constituting or resulting in the violation;
4. The person acted with reckless disregard or indifference to:
  - (a) The existence of the requirement;
  - (b) The meaning of the requirement; or
  - (c) Whether the intended conduct conformed to the requirement.

### 6.1.1 Use of EA Numbers

- a. All cases involving willful violations (including those dispositioned as NCVs or involving discretion) require:
  1. An EA number for tracking purposes; and
  2. OE and OGC concurrence on the final package.

### 6.1.2 Enforcement Sanctions for Willful Violations


- a. Because a willful violation is normally a significant regulatory issue, enforcement sanctions:
  1. Should demonstrate the unacceptability of such actions; and

2. Could include, in the event the agency loses reasonable assurance that licensed activities can be conducted safely, orders amending, suspending or revoking a license or preventing an individual from conducting activities involving regulated materials.
- b. **A violation may be considered more significant than the underlying noncompliance if it includes indications of willfulness.**
1. In determining the significance of a violation involving willfulness, the relative weight of each of the following factors will be assessed based on the circumstances of the violation, including:
    - (a) The position of the person involved in the violation (e.g., a supervisory or non-supervisory employee whether working for the licensee or for a contractor);
    - (b) The regulatory responsibilities imposed on the person involved in the violation (e.g., a licensed operator or an unlicensed operator fulfilling a position of regulatory significance related to the public health and safety or the common defense and security;
    - (c) The significance of any underlying violation;
    - (d) The intent of the violator (i.e., deliberateness or careless disregard); and
    - (e) The economic or other advantage, if any, gained as a result of the violation.
- c. If a licensee refuses to correct a minor violation within a reasonable time such that it willfully continues, the violation should be considered at least more than minor.
- d. Licensees must take remedial action in responding to willful violations commensurate with the circumstances that demonstrate the seriousness of the violation, thereby creating a deterrent effect within the licensee's organization.
-  If the agency cannot make a conclusion as to whether an issue involves willfulness, it may issue a Demand for Information (DFI) to the licensee, requesting information on whether the NRC can have reasonable assurance that the licensee will conduct its activities in accordance with NRC requirements.
- e. Every case involving a willful violation will normally be considered for escalated action. However, in an effort to encourage licensees to act responsibly in the identification and correction of such violations, the NRC may choose, in accordance with the [NRC Enforcement Policy](#), to disposition certain violations by issuing an NCV if the licensee identified and corrected the violation.

## 6.2 Office of Investigation (OI) Investigations and Reports

- a. OI may conduct an investigation for alleged wrongdoing by NRC licensees, individuals or organizations who are licensed by the NRC, have applied for NRC licenses, or who are vendors or contractors of NRC licensees.

1. **Wrongdoing** involves a violation of NRC requirements resulting from discrimination, deliberate misconduct, or careless disregard.
  2. The NRC staff is required to notify OI when a reasonable basis exists for believing that wrongdoing may have occurred.
  3. Upon receipt of an OI report involving wrongdoing, OE, OGC, the region, and the appropriate program office perform an initial screening to determine appropriate enforcement action.
- b. For **discrimination cases**, OI investigates only those cases that:
1. Meet the *prima facie* threshold discussed in (a) below.
    - (a) To constitute a ***prima facie*** case, the complainant must establish that:
      - (1) He/she was engaged in a protected activity (an employee participates in a protected activity when he/she raises safety-related issues or any issue within the NRC's regulatory jurisdiction, even if the context in which he or she does so is the resolution (rather than raising) of another safety issue);
      - (2) Management had knowledge of the protected activity;
      - (3) An adverse action was taken (or threatened); and
      - (4) A nexus exists between the adverse action and the protected activity, i.e., the action was taken in part (contributing factor), or in close temporal proximity to, the protected activity.
  2. Are potentially more significant cases from an enforcement perspective.
- c. Those cases that do not constitute a *prima facie* case are not normally investigated by the NRC.
- d. Complaints that do not constitute a *prima facie* case but do indicate a pattern developing at a licensee site or other circumstances which indicate a potentially degrading safety conscious work environment (SCWE) at a licensee site, may warrant followup investigation.

 **A Safety Conscious Work Environment (SCWE)** is an environment that encourages individuals to raise regulatory concerns to the licensee and/or directly to the NRC without fear of retaliation.

### 6.2.1 Delaying Enforcement Action Pending Investigation

In cases where an OI investigation is being conducted, enforcement action should generally not be taken for matters that are within the scope of the OI investigation until the investigation has been completed and the report issued.

### 6.2.1.1 Cases Requiring Immediate Action

- a. If immediate action is required to protect the public health and safety or provide for the common defense and security, the staff will not wait for completion of the OI investigation and report to initiate and issue enforcement action, e.g., when the OI investigation discloses a significant safety issue that includes a preponderance of evidence that a person in a position of responsibility has engaged in wrongdoing, i.e., has committed a willful act that causes the NRC to lose reasonable assurance that licensed activities (1) will be performed in accordance with the Commission's requirements, or (2) will not create an undue risk to the public health and safety or the common defense and security.
- b. If during an OI investigation, the OI Field Office Director concludes that sufficient evidence of wrongdoing exists:
  1. The OI Field Office Director will promptly notify the appropriate Regional Administrator (This preliminary conclusion is subject to change based on additional investigation and review);
  2. The Regional Administrator will promptly consult with the Director, OE; and
  3. The Director, OE, will coordinate, as appropriate, with OGC and the appropriate program office to determine whether immediate action is necessary.
- c. If it appears that immediate action is appropriate, the Regional Administrator will request OI to promptly furnish the region, OE, OGC, and the program office with the evidence gathered (e.g., transcripts or document exhibits) and also provide briefings, as necessary, in order to develop an appropriate case.
- d. If it is determined that enforcement action should be taken, OE will:
  1. Advise the Director, OI, of the reasons why enforcement action should proceed during the pending investigation; and
  2. Coordinate with DOJ (in accordance with the NRC/DOJ Memorandum of Understanding discussed below) if the Director, OI, determines that the case will likely be referred to DOJ for prosecution.
- e. If the Regional Administrator and the Director, OE, determine that immediate action is not necessary:
  1. The region should prepare a brief note to the regional case file, with a copy to OE and the program office, explaining the basis for the initial decision. This note should:
    - (a) Include the caveat that the initial decision is "based on evidence to date."
    - (b) Be labeled, "**Official Use Only - Predecisional Enforcement Information.**"
  3. If disagreement exists between the Regional Administrator, the Director, OE, and/or the program office, the matter will be promptly elevated for the DEDO's consideration.
  4. After the complete OI investigation report is issued:

- (a) The region should reconsider whether regulatory action is necessary; and
- (b) If enforcement action is warranted but has not already been taken, such action should be taken after DOJ completes or declines the case that was referred to them.

### 6.2.1.2 Cases Not Requiring Immediate Action

- a. If there is no immediate public health and safety or common defense and security concerns:
  - 1. Technical issues should be addressed apart from the OI issues if this can be accomplished without compromising the pending OI investigation.
  - 2. If addressing technical issues might involve the release of information that could compromise the OI investigation, OI must be consulted before such information is released.
- b. If there are associated violations arising from an inspection that can be separated from the issues OI is investigating:
  - 1. The region may proceed with an enforcement action for those violations before issuance of the OI report, but only after consultation with the Director, OE.
  - 2. Review the OI report when it is issued to determine if the separated action should be reopened.

### 6.2.2 Department of Justice Referrals

- a. Alleged or suspected criminal violations of the AEA and other relevant Federal laws are referred to DOJ.
- b. OI refers cases to DOJ during or upon completion of an OI investigation involving willful violations.
- c. OI may refer a case to DOJ involving an apparent willful violation where circumstances warrant such action.

✓ All enforcement cases involving referrals to DOJ shall be coordinated with OE to ensure the statute of limitations is being tracked, as required by SRM COMSECY-05-0033, dated September 9, 2005.

#### 6.2.2.1 Policy of Withholding NRC Action

- a. As a general policy, if a matter has been referred to the DOJ, unless immediate action is necessary for public health and safety or common defense and security reasons, issuance of an enforcement action should be withheld to avoid potential compromise of the DOJ case, pending DOJ determination that the enforcement action may be issued.

☞ It should be noted that OE has increased its focus on statute of limitations (see section 6.3) deadlines which will help ensure that any contemplated enforcement actions can be completed before the SOL runs out.

- b. On a case-by-case basis, there may be reasons, e.g., potential resource savings or competing priorities, for delaying the review of an OI report while a case is under review at DOJ.
- c. For those cases for which DOJ is likely to convene a Grand Jury, OE should coordinate its efforts with OI to ensure that OI can provide investigators who are not constrained in communicating to the NRC staff by the Federal Rules of Criminal Procedure regarding Grand Jury proceedings, and can, therefore, separately support any possible NRC enforcement action.

### 6.2.2.2 NRC Enforcement Action

- a. Notwithstanding the policy on withholding NRC enforcement action for those cases accepted by DOJ, the staff should take certain actions to ensure timely processing of enforcement actions upon DOJ release or declination:
  - 1. Within six weeks of receiving an OI report, or two weeks after the enforcement panel, the Director, OE, will normally contact DOJ to advise them of the NRC's intended direction in terms of any potential enforcement action. This will enable DOJ to advise OE if an NRC enforcement action will interfere with planned DOJ action.
    - (a) If DOJ does not object to the NRC conducting a PEC, then the region should do so and submit a preliminary recommended enforcement action.
    - (b) If DOJ requests that the NRC stay the conduct of a PEC, the region should consult with OE on whether a preliminary action should be drafted pending DOJ review.
    - (c) If DOJ determines that a referred case lacks prosecutive merit, it will normally notify the NRC (Director, OI) by a letter of declination. OI should promptly call OE upon receipt of the letter and should send copies of the letter to OE and the applicable region as soon as possible so that the enforcement process can proceed in a timely manner.
- b. Following DOJ release or declination, the region should:
  - 1. Hold a PEC, if the case is not already concluded;
  - 2. Make any necessary adjustments to the draft enforcement action, including the Strategy Form, based on the information provided during the conference; and
  - 3. Submit its revised recommendation to OE within a week of the conference, after which OE will process the case on an expedited basis.

### 6.2.2.3 Memorandum of Understanding (MOU) Between the NRC and DOJ

- a. The MOU between the NRC and DOJ (published in the *Federal Register* on December 14, 1988) is included on the Enforcement Web site at:  
<http://www.nrc.gov/what-we-do/regulatory/enforcement/moudoj.pdf>.



## b. The MOU addresses:

1. Coordination of matters that could lead to enforcement action by the NRC as well as criminal prosecution by DOJ;
2. The exchange of information between the agencies;
3. The responsibilities of each agency, including the NRC's responsibilities to notify DOJ of suspected criminal violations;
4. Coordination with DOJ on NRC regulatory activities that run parallel to or may affect DOJ activities. Under this section, potential NRC actions are divided into three categories:
  - (a) Actions the NRC needs to take when it concludes that the NRC lacks reasonable assurance that activities authorized by a licensee are being conducted without endangering the health and safety of the public or the common defense and security;
  - (b) Immediate action the NRC must take to protect the public health, safety, or the common defense and security; and
  - (c) Actions the NRC must take to fix an immediate problem. This category applies when time does not allow for reasonable consultation. The NRC is to notify DOJ in advance if time permits and, if not, as soon as possible after the action is taken.
5. NRC's responsibility to consider the views and concerns of DOJ to the fullest extent possible consistent with the regulatory action that the NRC believes is required;
6. Civil penalty actions.
  - (a) Before issuing a civil penalty based on a referred case or one involving "special circumstances," the NRC will notify DOJ of the contemplated action.
  - (b) NRC should defer initiation of the action until DOJ either concludes its criminal investigation or prosecution, or consents to the NRC action. One exception is provided, pertaining to matters involving the statute of limitations.
7. Exchanges of information between the NRC and DOJ; and

☛ If the NRC proceeds with a case that DOJ is still processing, NRC has agreed to seek a stay in any resulting hearing, provided DOJ is prepared to support the staff with appropriate affidavits and testimony. The Director, OE, is the staff official responsible for coordinating regulatory activities with DOJ; however, the Director, OI, normally interfaces with OI and OGC also has certain coordination responsibilities.



8. The time frames for consultation, i.e.:
  - (a) NRC's commitment to notify the DOJ of contemplated civil enforcement action, normally within 45 days of a referral to DOJ; and
  - (b) DOJ's commitment to notify NRC of its preliminary position on criminal prosecution or investigation, normally within 60 days of the referral.

### 6.2.3 Release of OI Reports and Transcripts of Interviews

a. Release of OI reports and exhibits:

1. Will not normally be provided if OI concludes that disclosure could interfere with ongoing investigation activities. If this situation arises, the Regional Administrator and Director, OE, will consult on how to proceed.
2. Are not generally available to the licensee or public until after the enforcement action has been issued, except in cases involving DOL hearings (discrimination cases).

✓ The Director, OE should be consulted before release of any OI report (and/or exhibits) associated with an enforcement action. In addition, in every case, exhibits will normally be provided only if requested through the FOIA process. Additional information is included in Management Directive 3.4, "Release of Information to the Public."

3. A conference letter or choice letter (see forms in Appendix B) will normally include a factual summary which provides notice to the conference participants of the factual basis for the staff's preliminary conclusion that NRC regulatory violations occurred.

b. Transcripts of interviews conducted to support enforcement action:


1. Should **NOT** be released to licensees or the public without prior approval by the Director, OE, and the Director, OI, until after the action has been issued.
2. May be released to individuals, if an individual (or individual's attorney) requests a copy of the transcript of their OI interview to prepare for a PEC (of which they are the subject), provided that the related OI investigation is complete and closed. The Director, OI, and Director, OE, should be consulted in these cases.
3. Will **NOT** be made available to the public until after the enforcement action is issued.

c. For **discrimination cases**, the SRM for SECY 02-0166, "Policy Options and Recommendations for Revising the NRC's Process for Handling Discrimination Issues," directed that the OI report, with appropriate redactions and without the supporting documentation (exhibits or other referenced information) and after OGC review of the sufficiency of the evidence, should be provided to the PEC participants prior to the conference.

1. To implement this direction, after an enforcement panel determines that a PEC is warranted, the responsible enforcement specialist should request, typically by electronic

mail, a bracketed version of the OI report from the appropriate OI Field Office Director or OI headquarters.

2. OI will bracket, in preparation for redaction, the report using OI's second party requestor standard, including privacy and attorney-client privilege information.

 **“PEC participants”** is a term that generally encompasses the licensee (the licensee's management and legal counsel), the complainant, and any individual who may have been offered an individual PEC.

3. The bracketed OI report will be forwarded from OI to the staff noting that release of the redacted report to PEC participants is acceptable. The OI report will continue to indicate that it is not for public disclosure without the approval of the originating field office director.

- (a) After OI brackets the report, typically the assigned enforcement specialist, the headquarters allegation specialist, and the OGC enforcement attorney should review the report to ensure appropriate redaction has been completed.

- (b) OGC may complete the review as part of concurrence in the PEC letter.

- (c) Since the release is discretionary and not in response to a FOIA request, the staff is not bound by FOIA law when redacting the report. Additional redaction may be appropriate on a case-by-case basis, such as to protect other on-going enforcement actions.

4. The memorandum forwarding the report from OI to the staff provides approval for release to the PEC participants.

5. The redacted OI report will also be provided if a choice letter is used.

- (a) If a licensee provides a written response to the choice letter, determination of whether to provide the complainant a copy of the OI report will be made on a case-by-case basis.

- (b) Typically, if the staff is persuaded by the licensee's written presentation, the licensee's presentation and the OI report would be provided to the complainant for comment.

- (c) If the staff is not persuaded by the licensee's presentation, providing the OI report to the complainant will be considered on a case-by-case basis.

- (d) For cases involving DOL hearings, OE is to prepare a transmittal letter to send the OI report to the parties involved in the DOL action. Use the appropriate Form letter from Appendix B.

6. Consistent with all allegation material, the **redacted OI report will not be placed in ADAMS** because the standard for redacting documents may not adequately redact the document for general public release.


### 6.2.4 Processing Administratively Closed OI Cases

OI may choose to administratively close a case for several reasons including a lack of resources or because of an ongoing activity by another agency associated with the case.


- a. **Lack of Resources:** Whenever OI closes a case for lack of resources, the region or applicable program office will review the case and make an initial determination of the action, if any, that appears warranted. This includes, where appropriate, discussing with OE the assignment of a higher priority.
  1. The region or applicable program office will first review the OI priority criteria and make a determination of whether the OI priority should be changed or whether the case should be reopened.
  2. If the case should be reopened, the region or applicable program office will either:
    - (a) Issue a memorandum to the Regional Administrator/Office Director; or
    - (b) Schedule a multi-office meeting involving the region, OE, OGC, and the applicable program office to discuss the merits of changing the priority or reopening the investigation.
  3. The region or applicable program office will also review the final field notes or inspection report (not a draft) for the case to determine whether there is sufficient information to conclude that a violation exists and that enforcement action appears warranted.
  4. If the region or applicable program office concludes that a non-willful violation exists, the case will be handled using the normal NOV process.
  5. If the region or applicable program office concludes that a willful violation exists, the region or applicable program office will schedule a multi-office meeting with the region, OE, OGC, and the applicable program office to discuss the appropriate course of action to take.
  6. If the region or applicable program office concludes that neither a violation nor wrongdoing exists, it will:
    - (a) Issue a memorandum to the Regional Administrator, the Associate General Counsel for Hearings, Enforcement & Administration, and the appropriate Office Director, stating this conclusion and inviting the recipients of the memorandum to respond to the memorandum's proposal to take no enforcement action.
    - (b) Close the matter if, after three weeks, no differing views have been received.
    - (c) Subsequently, the responsible office should send a letter to the licensee or vendor (if individuals other than the alleged were interviewed during the investigation) to notify them that the matter has been resolved or closed.
      - (1) The letter should provide the results of the investigation which can be in the form of a short summary of the OI report or a copy of the OI synopsis.

- (2) Release of the synopsis should be coordinated with the OI Field Office Director, unless authorization for release was previously granted.
  - (3) The region or program office sending the close-out letter should also coordinate with OE to verify that the matter is in fact closed and that no other office has an open issue.
  - (4) Additional information is included in Management Directive 3.4, "Release of Information to the Public."
- b. **Activity by Another Agency:** OI may administratively close a case because another agency, such as DOL or DOJ, may be considering action associated with the case. In these cases, OE will assign an EA number to the case in an effort to:
1. Ensure that the staff revisits the case after the other agency has completed its activity; and
  2. Track the issue so that the staff can determine whether to take action before the other agency has completed its activity should the statute of limitations become an issue.

### 6.3 Statute of Limitations

- a. The **Statute of Limitations**, codified at 28 USC § 2462:
1. Establishes an affirmative defense that may be asserted by a person against whom a sanction is proposed; and
  2. Is intended to prevent the prosecution of stale claims.
-  The timeliness of initiating enforcement actions helps to ensure that the enforcement program is effective in achieving its objectives.
- b. The five-year statute of limitations requires the NRC to initiate an action imposing a civil penalty, issuing an order to modify, suspend, or revoke a license, or issuing an order to prohibit involvement in NRC-licensed activities within the five-year statutory period.
1. Absent special circumstances, the NRC must initiate the action imposing a sanction no more than five years from the date of the violation.
  2. The statute does not prevent the staff from issuing an NOV (without a civil penalty or other sanction) even if the underlying violation occurred more than five years earlier.
  3. The statute does not prevent the staff from issuing an order requiring an action needed to ensure compliance with existing requirements regarding protection of the public health and safety, promoting the common defense and security, or protecting the environment.
- c. There are circumstances in which NRC's action cannot be initiated promptly, e.g., when a matter has been referred to DOJ for consideration of criminal prosecution.

1. Normally, if a matter has been referred to DOJ, issuance of an enforcement action should be withheld to avoid potential compromise of the DOJ case, pending DOJ determination that the enforcement action may be issued.
2. All enforcement cases involving referrals to DOJ should be coordinated with OE.
- d. To protect the NRC's authority to impose a sanction in cases where the five-year period is nearing an end but staff review of the case is not complete:
  1. The responsible office should seek a waiver from the licensee or other entity that the statute of limitations defense will not be asserted. This requires Commission approval; or
  2. Issue the enforcement action before the statute of limitations date expires:

 In those very infrequent instances where the five-year limitations period is nearing an end, consult with OGC and OE.

    - (a) After appropriate consultation with DOJ, notwithstanding the pendency of the DOJ review; and
    - (b) Without conducting discretionary agency process that are normally conducted, e.g., a PEC.
    - (c) When the NRC issues an action prior to completing its review in order to protect its authority to impose a sanction, the action may be modified after the staff's review is complete.
- e. There are cases in which the statute of limitations period may be suspended (i.e., tolled), e.g., where the licensee fraudulently concealed a violation or where the licensee failed to provide the NRC with a required notification of an underlying violation. In such cases, OGC should be consulted so that a legal determination can be made as to whether the statute of limitations can be tolled.
- f. In accordance with the [SRM COMSECY-05-0033](#):
  1. On a quarterly basis, OE should provide a report to the Commission for information, preferably following OI's communication with DOJ, regarding the status of any cases that is under review for prosecution.
  2. Once a case is within one year of the statute expiring, and **no less than six months in advance** of reaching the statute of limitations,
    - (a) OE will develop a plan-of-action and inform the Commission.
    - (b) OE should seek Commission approval prior to any agreement with DOJ that the NRC will seek a waiver of the statute of limitations from the party under investigation.
  3. For cases with increased stakeholder interest, the staff should be particularly vigilant about initiating actions as soon as possible and communicating relevant information to the Commission.

## 6.4 Enforcement Process

- a. In accordance with the Discrimination Task Force recommendation, the Commission approved centralization of the enforcement process for discrimination cases; therefore, OE has the lead for all discrimination cases.
- b. For other wrongdoing cases (i.e., wrongdoing cases that do not involve discrimination), the region in which the wrongdoing occurred has the lead.

### 6.4.1 Roles and Responsibilities

a. For **discrimination cases**:

1. OE has the responsibility for:
  - (a) Scheduling and preparing for the enforcement panel, PEC, and enforcement caucuses;
  - (b) Preparing enforcement actions;
  - (c) Reviewing responses to NOVs;
  - (d) Drafting and issuing any necessary press release.
  - (e) Communicating with licensee management, complainant, and for keeping the region informed of any actions to be taken;
  - (f) Assigning the EA number for the case;
  - (g) Filling out the Strategy Form to document the proposed enforcement strategy.
2. The region is responsible for:
  - (a) Participating in enforcement panels, etc., to provide specific licensee enforcement perspectives and maintain awareness of pending enforcement action;
  - (b) Providing notification to external stakeholders including the state liaison officer;
  - (c) Issuing the closeout letter for any unsubstantiated cases; and
  - (d) reviewing the case for the identification and evaluation of any underlying technical issues and to provide clarification on site specific issues.
3. OGC is responsible for:
  - (a) Reviewing and providing legal advice on escalated enforcement actions, orders, actions involving OI findings;
  - (b) Representing the staff in any NRC adjudicatory hearings on enforcement actions; and

- (c) Determining the sufficiency of the evidence to support a violation of the discrimination regulations.
- b. For **wrongdoing cases**:
  - 1. The applicable region is responsible for:
    - (a) Scheduling and preparing for the enforcement panel, PEC, and enforcement caucuses;
    - (b) Preparing enforcement actions;
    - (c) Reviewing responses to NOVs;
    - (d) Drafting and issuing any necessary press releases;
    - (e) Communicating with licensee management and the complainant;
    - (f) Providing notification to external stakeholders including the state liaison officer;
    - (g) Issuing the closeout letter for any unsubstantiated cases; and
    - (h) Reviewing the case for the identification and evaluation of any underlying technical issues and to give clarification on site specific issues.
  - 2. OE is responsible for:
    - (a) Participating in enforcement panels, PEC, enforcement caucus, and to provide perspectives and concur on any actions taken;
    - (b) Assigns the EA number; and
    - (c) Fills out the Strategy Form to document the proposed enforcement strategy.
- c. For cases involving DOL interface, OE takes the lead once the DOL Administrative Law Judge finds for the complainant.

#### 6.4.2 Processing OI Reports


- a. The following steps (discussed in greater detail below) should be taken to process OI reports. The **responsible office** within this process refers to the region, OE, or program office responsible for the allegation(s) that are the subject of the OI investigation.

✓ Coordination with OE is required for all substantiated OI reports or if the responsible office concludes that a violation in an unsubstantiated report may be willful.

- 1. Receipt and initial screening of the OI report by the responsible office to determine whether:
  - (a) There are immediate safety concerns; or




- (b) Enforcement action appears warranted; or
  - (c) Enforcement action does not appear warranted; or
  - (d) Disagreement exists with OI conclusions.
2. OGC completes analysis of the OI report to determine if sufficient evidence exists to support enforcement action.
  3. Hold an enforcement panel to determine the general direction of any enforcement action that may be appropriate.
  4. Prepare and process the resulting enforcement action.
- b. Regardless of the age of issues addressed by OI reports, processing OI reports is considered an enforcement priority; therefore, timeliness goals stated within the steps of these procedures should be followed, if possible.

 Conclusions should be based on the evidence in the exhibits of the OI report. The OI report should serve as an overview to guide review of the exhibits.

#### 6.4.2.1 Receipt and Initial Screening

- a. Upon receipt of the OI report, the region, OE, and the appropriate program office will determine from the OI report and exhibits whether:
  1. Safety concerns are identified; and
  2. Immediate regulatory action is warranted based on identified safety concerns.
- b. **Within one week of receiving an OI report**, the responsible office will review the case and make an initial determination that:
  1. If the responsible office believes **an immediate safety concern** exists:
    - (a) The responsible office will immediately notify OE.
    - (b) The region, program office, and OE will evaluate the need for immediate regulatory action, such as the issuance of an immediately effective order.
      - (1) If immediate enforcement action is warranted, OE will coordinate the action with the other offices, including OGC, and expedite the process. This should be a rare occurrence, in light of the coordination that should have occurred when the matter was first identified.

 Notwithstanding the stated timeliness goals, it is recognized that additional review time may be necessary for unusually complex cases or those with an unusually large number of exhibits.

- (2) If any other office or region believes that immediate action is warranted, OE should be immediately contacted.
  - (3) For cases which have been referred to DOJ, refer to the Memorandum of Understanding for guidance.
2. If the OI report findings indicate that **no immediate safety concern exists but enforcement action appears warranted**, the responsible office will:
  - (a) Coordinate with OE to schedule an enforcement panel with the region, the program office, and OGC to discuss the findings of the OI report and the development of possible enforcement action.
  - (b) Schedule a panel for approximately four weeks from the receipt date of the OI report. The responsible office should invite OI to participate.
  - (c) If the OI report does not indicate willfulness but there are still violations present, indicate in a three-week e-mail message (discussed below) that barring a differing view, the non-willful violations will be treated in accordance with normal enforcement processes.
3. If the responsible office determines that there does not appear to be a violation of NRC requirements and, therefore, **no enforcement action appears warranted**, normally the responsible Regional office enforcement coordinator will:
  - (a) Issue an electronic mail (e-mail) message within 60 days after receiving the OI report indicating that no enforcement action is being considered. This message (formerly a memo) is commonly referred to as a “three-week e-mail” based on the allowed response time specified in the message. The email message should be addressed to:
    - The Director, OE
    - The Assistant General Counsel for Materials Litigation and Enforcement
    - The appropriate Office Director or Regional Administrator (or designee)
    - Copies should be sent to “OEMAIL”, the Regional Enforcement Coordinator, and the Program Office Enforcement Coordinator
  - (b) Invite a response to the proposal of no enforcement action;
  - (c) Consider the matter closed if after three weeks from the date of the e-mail message, the responsible office has not received differing views; and, thereafter,
  - (d) Send a letter to the licensee or vendor (if individuals other than the alleged were interviewed during the investigation) to notify them that the investigation is complete and that no enforcement action is being proposed. The letter should provide the results of the

✓ Release of the synopsis should be coordinated with the OI Field Office Director, unless authorization for release was previously granted. (The region, in coordination with OI, will ensure that the identity of any alleged or confidential source will not be compromised through the release of the synopsis.)

investigation which can be in the form of a short summary of the OI report or a copy of the OI synopsis; and

- (e) Send a closure letter to the alleged in accordance with [Management Directive 8.8, "Management of Allegations."](#)

c. **Disagreements With OI Conclusions:** If any NRC staff (other than OI) disagrees with an OI report conclusion regarding willfulness, the responsible office should:


1. Promptly inform the assigned OGC attorney;
2. Schedule an enforcement panel to discuss OI's conclusion
3. Document the decision on a Strategy Form.
  - (a) OE will check the applicable boxes depicting the nature of the disagreement with OI's conclusion; i.e., the case does not meet:
    - (1) The legal threshold for taking an enforcement action if OGC determines the case does not meet the threshold for prevailing at a hearing.
    - (2) The policy threshold for taking an enforcement action regarding deliberate misconduct, careless disregard, or non-willful violations, if the staff determines that enforcement action should not be taken; e.g., for a minor violation of low safety consequence.
  - (b) In the comment section of the Strategy Form, provide a brief (one or two sentence) statement of the reason for not taking an enforcement action.
4. OE will provide the Strategy Form to the panel participants.
  - (a) If any of the parties disagree with the strategy, they should contact the assigned Enforcement Specialist as soon as possible, and normally not later than 24 hours after receiving the Strategy Form.
  - (b) In rare circumstances, the issues may be significant enough to warrant direct discussion between the Directors, OI and OE.
    - (1) If the issues cannot be resolved between the Directors, Commission consultation is necessary.
    - (2) If the Directors determine Commission consultation is not needed, OE should document the nature of the disagreement on the Strategy Form as described above.
  - (c) If a Commission paper is required because of disagreements concerning willfulness, the Commission paper should include a summary of the rationale upon which OI based its conclusions and a summary of the non-OI staff's basis for reaching different conclusions.

### 6.4.2.2 OGC Analysis of OI Report

- a. Typically, within two weeks of receiving an OI report which substantiates discrimination or other willful violations, OGC should:
  1. Should complete its review of the OI report and exhibits;
  2. Inform the responsible office enforcement coordinator; and OE Enforcement Specialist whether there is sufficient evidence to support enforcement action.
  3. Discuss the apparent willful violations and the evidence which supports those violations with the assigned OE Enforcement Specialist and/or the responsible office enforcement staff to assist in preparing for the enforcement panel.
- b. If OGC determines that there are significant legal concerns with the OI conclusions or that there is insufficient evidence to support them, OGC should promptly inform OE. OE will coordinate with OI and the other offices to determine the appropriate course of action during the enforcement panel.
- c. If OE, the region, or the program office identify weaknesses in the evidence, they should promptly inform the assigned OGC attorney so that their views can be considered.

### 6.4.3 Enforcement Panel

- a. For wrongdoing cases, the responsible region or program office should prepare for an enforcement panel by preparing an enforcement panel worksheet including the responsible office's enforcement recommendation.
- b. For discrimination cases, OE will prepare the enforcement panel worksheet and a written analysis of the evidence for purposes of the enforcement panel discussion.
- c. **Within approximately four weeks of receiving an OI report, or within two weeks following OGCs determination**, OE, the region, OGC, and the applicable program office will participate in an enforcement panel to determine the general direction of any enforcement action that may be appropriate. The responsible office should invite OI to participate.


 It is important that participants be authorized to speak for their office.
- d. During the panel, the participants, among other things, may or may not:
  1. Agree with the OI findings;
  2. Agree on the issue of willfulness (i.e., careless disregard or deliberate intent);
  3. Conclude that additional information is required; and
  4. Agree on the appropriate enforcement action approach.

- (a) For the first two scenarios, it may be appropriate for the OI Field Office Director or the investigator to provide a briefing to the rest of the staff on the details of the case.
  - (b) For the third scenario, potential weaknesses may be identified in the evidence. Any concern(s) should be discussed at the panel.
    - (1) OI may be asked as to the likelihood of obtaining further information through investigation.
    - (2) Alternatively, after consulting with OI, it may be appropriate to issue a DFI to request additional information from the licensee.
- d. In discrimination cases where DOL determined discrimination occurred and OI did not substantiate:
  - 1. It may be appropriate, depending upon the basis of the DOL decision, to schedule an enforcement panel to review the DOL documentation (e.g., Final Investigative Report, ALJ hearing transcripts, etc.).
  - 2. If consensus cannot be reached during this panel regarding the enforcement action approach, OE will promptly arrange a meeting with the respective Office Managers.
- e. If two investigative findings of discrimination by the same licensee are made within 18 months (either by OI or OSHA):
  - 1. The region should request an EA number; and
  - 2. The region should schedule a multi-office enforcement panel to discuss the agency's strategy for requesting the licensee to ascertain whether a cultural problem exists and to identify any particular areas within the workplace in which supervisors do not appreciate the importance of raising concerns.
    - (a) The NRC can require the licensee's senior management to meet with the Regional Administrator to explain the employment actions in question, and to address what actions the licensee is taking to ensure that employees are not "chilled."
    - (b) The licensee should be expected to address:
      - (1) Whether it has confidence that remedial actions have been effective; and
      - (2) The basis for this view.
    - (c) The letter establishing this meeting can be in lieu of, or combined with the CEL.
- f. If more than two investigative findings of discrimination occur within an 18-month period, the NRC should consider stronger action.
  - 1. As part of that consideration, a DFI might be issued as to why the licensee should not be ordered to obtain an outside independent contractor to:

- (a) Review the licensee's programs for maintaining a safety-conscious work environment or safety culture;
  - (b) Survey employees to determine whether they feel free to raise concerns without fear of retaliation; and
  - (c) Develop recommendations, if warranted, to improve the workplace environment.
2. If an adequate response is not received to this DFI, then the NRC should consider issuing an order.

#### 6.4.3.1 Written Summary of Case (Discrimination Only)

- a. In every discrimination matter the staff considers for enforcement action, OE will prepare, prior to and for purposes of the enforcement panel discussion, a written summary of the evidence that may support each element of a discrimination case. Those elements are:
  1. Did the employee engage in "protected activity" as that term is defined in Section 211 of the Energy Reorganization Act of 1974 (ERA), and the Commission's discrimination requirements, e.g., 10 CFR 50.7(a)(1), and interpreted by the Department of Labor and the courts?
  2. Was the employer (an NRC licensee, applicant for an NRC license, contractor or subcontractor of a licensee or applicant) aware of the protected activity at the time of the adverse action?
  3. Was an adverse action taken by the employer against the employee, which affected the employee's terms, conditions or privileges of employment?
  4. Was the adverse action taken, at least in part, because of the protected activity?
- b. The purpose of the written analysis is to reach a determination in each discrimination matter as to whether, based on all the available evidence, there is information sufficient to provide a reasonable expectation that a violation of the Commission's discrimination requirements, e.g., 10 CFR 50.7, can be shown by a preponderance of the evidence.


 The length of the analysis should normally be limited to one or two pages.

  1. The analysis should include a statement of OGC's position, if available, as to whether the evidentiary standard is satisfied.
  2. The staff and OGC's conclusion may be added after the panel.
- c. The analysis may be revised during the deliberative process, as the matter is further considered by all NRC components involved in the enforcement process.
- d. Revised analyses should be distributed to the principal participants in the deliberative process.

- e. The analysis should be placed in the enforcement file.
- f. Appendix D includes a sample written analysis of a discrimination matter that the staff may use as a guide in preparing summaries.

#### 6.4.3.2 Enforcement Panel Outcome

- a. At the enforcement panel the staff may conclude that:
  - 1. No violation occurred;
  - 2. Non-escalated enforcement should be proposed;
  - 3. Escalated enforcement action should be considered; or
  - 4. A PEC does not need to be conducted.
- b. If the staff concludes that escalated action should be considered:
  - 1. The NRC may provide an opportunity for a PEC with the licensee, contractor, or other person before taking enforcement action; or
  - 2. If the case has not been accepted by DOJ, the region or OE should, if applicable, schedule a PEC with, or issue a choice letter to the licensee.
    - (a) The conference letter or choice letter (see forms in Appendix B) will normally include a factual summary which provides notice to the conference participants of the factual basis for the staff's preliminary conclusion that NRC regulatory violations occurred.
    - (b) If a factual summary is included, it should be a stand alone document that contains all the operative facts or the factual basis for the staff's preliminary conclusion that a NRC regulatory violation occurred. It is not intended to provide a full discussion of the evidence gathered in the course of the NRC's investigation.
    - (c) The summary should not normally include the names of individuals involved in the potential enforcement matter, rather titles or other generic description should be utilized. Other personal or proprietary information should not be included.

 The staff, in coordination with OI, will ensure that the identity of an alleged or confidential source will not be compromised through the release of the factual summary or synopsis.
    - (d) While the length of the summary in each case depends on the facts, it should not ordinarily exceed two single-space pages (see sample summary in Appendix D).
    - (e) In most cases the factual summary will provide the same information that is contained in the OI report synopsis. If this is the case, the synopsis does not need to be enclosed.



- (f) The conference letter or choice letter should be provided to the licensee at least two weeks in advance of the conference.
- 2. For **discrimination cases**, OE should normally schedule the PEC within 60 days from the date of issuance of the OI report.
  - (a) A PEC may not need to be held in such cases where there is a full adjudicatory record before DOL. If a conference is held in such cases, generally the conference will focus on the licensee's corrective action and not the facts of the case.
  - (b) When scheduling the PEC, the NRC should establish two dates which are mutually agreeable to the NRC and the licensee. The complainant should be given the option of either of these two dates for the conference.
  - (c) A separate letter should be sent to the individual subject to the alleged discrimination providing the individual an opportunity to attend the licensee's conference.
  - (d) The individual should be provided with a copy of the letter to the licensee.
  - (e) In certain cases, typically when the proposed enforcement action is based upon a decision by an Administrative Law Judge of the Department of Labor, no factual summary should be necessary, since the participants will be fully conversant with the facts to be discussed at the PEC.
  - (f) In addition, there may be other matters in which the parties have investigated or adjudicated the issues.
    - (1) The staff need not automatically prepare a summary when it proposes an enforcement conference.
    - (2) The recommendation to forgo preparation of a factual summary should normally be agreed to at the enforcement panel.

#### 6.4.3.3 Enforcement Action (EA) Number and Strategy Form


- a. Enforcement Action (EA) numbers are assigned by OE to administratively track and file a variety of enforcement issues including all findings addressed in an enforcement panel, regardless of whether a potential violation is involved.
- b. An Enforcement Specialist fills out the Strategy Form to document the enforcement strategy agreed upon by the panel.
  - 1. The Strategy Form should normally be completed within one working day of the panel, subsequent panel, or enforcement caucus.
  - 2. The parties involved should contact the Enforcement Specialist as soon as possible, and normally not later than 24 hours after receiving the Strategy Form, if they disagree with the characterization of the enforcement action as stated in the Strategy Form.

- c. In rare cases where the parties involved cannot reach consensus on an enforcement strategy, the Director, OE, and the Directors of the other involved offices will meet to determine the appropriate path forward.
  1. If the issues cannot be resolved between the Directors, Commission consultation is necessary.
  2. If the Directors determine Commission consultation is not needed, OE should document the nature of the disagreement on the Strategy Form as described above.

#### 6.4.4 Predecisional Enforcement Conference (PEC)

- a. Predecisional enforcement conferences are addressed in the Enforcement Policy and this manual.

- b. The PEC is normally closed for cases that involve:

 Refer to NRC Form 578, "Request for court reporting services" to request transcription services.

1. Potential wrongdoing by an individual; and
  2. Those that involve findings of an OI report that has not been publicly disclosed, (except if based on DOL finding).
- c. Absent coordination with the Director, OE, conferences should be transcribed for cases involving a licensed operator, a licensee employee who may have committed a willful violation, a significant case in which a record is warranted, any other case involving an OI report, or a case involving discrimination.
    1. Licensees will not be allowed to transcribe or record a conference.
    2. Transcripts should not normally be released until after any associated enforcement action has been taken.
      - (a) If a transcript release is being considered prior to an enforcement action being taken, the approval of the Director, OE is required.
      - (b) If the licensee or any individual at the conference is subsequently provided a copy of the transcript, whether by the staff's offer or the individual's request, the individual should be informed that a copy will also be made available to the public (subject to removal of privacy information, proprietary information, etc.).
      - (c) Transcripts from open conferences may be made available to the public sooner.
    3. Although transcribed conferences are not conducted under oath, the staff should make it clear to the person making a statement that when a false statement is made on a material matter, the person making the statement may be subject to civil and criminal prosecution.


- d. For **discrimination cases** where the whistleblower was not in attendance, the whistleblower is given the option of reviewing the PEC transcript and providing written comments.
  - 1. Discrimination PECs are typically closed to public observation since they involve personnel issues and frequently personal performance issues; however,
  - 2. If the evidentiary basis is a matter of public record, the licensee's PEC could be open to public observation.

#### 6.4.4.1 Attendees

- a. NRC Attendance: There should be a reason for each NRC person's attendance.
  - 1. OE and the applicable region should attend all significant conferences.
  - 2. The applicable program office enforcement coordinator should attend conferences as deemed appropriate by the program office, or as requested by the region or OE.
  - 3. OGC or Regional Counsel should typically attend wrongdoing conferences.
- b. Licensee Attendance:
  - 1. Licensee attendance should include senior level managers and individuals prepared to address the circumstances of the apparent violations and the corrective actions.
  - 2. When an individual's significant personal action contributed to the violation, consideration should be given to that person's attendance at the licensee's conference.
- c. In addition to the above, for **discrimination cases**:
  - 1. Complainant: The Enforcement Policy permits the individuals who were the subject of the alleged employment discrimination to participate in the conference.
    - (a) The complainant is included in establishing the conference date.
    - (b) The complainant is allowed no more than two personal representatives to attend the PEC.
    - (c) The complainant may participate by observing the conference and, following the presentation by the licensee:
      - (1) The complainant may, if desired, comment on the licensee's presentation and present his/her views on why he/she believes discrimination occurred;
      - (2) The licensee is afforded an opportunity to respond; and
      - (3) The NRC may ask clarifying questions.


#### 6.4.4.2 Reimbursement of Complainant's Travel Expenses (Discrimination Only)

- a. [Management Directive 14.1, "Official Temporary Duty Travel,"](#) allows for reimbursement of a complainant's travel expenses when the individual is performing a direct service to the government, generally referred to as invitational travel.
1. Because the NRC is requesting the complainant's presence at the PEC to assist the staff in determining the facts of a case, invitational travel is appropriate.
  2. Because the complainant's personal representative does not provide a direct service to the government, the Federal Travel Regulation does not allow reimbursement of their expenses.
- b. To facilitate the expense reimbursement process, OE should send the complainant a PEC confirmation letter (see forms in Appendix B) confirming the time, date, and location of the PEC.
1. When the NRC will reimburse the claimant's PEC travel expenses, the confirmation letter should also include an optional paragraph and enclosure regarding reimbursement of travel expenses. (Note: The claimant may choose to pay his or her own travel expenses or the expenses may be paid by a third party, i.e., the licensee. Under those circumstances, the optional information regarding reimbursement of travel expenses should not be used).
  2. When the NRC will reimburse the claimants's travel expenses, OE should also prepare and process NRC Form 279, "Official Travel Authorization" and provide assistance to the complainant in making travel reservations and in completing travel vouchers upon completion of the travel.


 In the [SRM for SECY-03-0172, "Reimbursement of the Travel Expenses of Individuals Requested to Attend a Predecisional Enforcement Conference,"](#) the Commission approved the reimbursement of only the complainant's travel expenses related to attending a PEC.

#### 6.4.4.3 Conduct of PEC

- a. PECs are conducted to gain a common understanding of the facts, corrective actions taken or planned, and significance of the issues. The process for conducting a PEC is describe in the Enforcement Policy and in this manual.
- b. PECs generally conform to the following agenda:
1. NRC will make an opening presentation.
  2. Licensee will be provided an opportunity to make a presentation.
  3. Frequently, the NRC will caucus briefly after the licensee's presentation to determine if additional questions remain.

 At no time will the complainant and the licensee be allowed to question each other directly.

4. Complainant (for **discrimination cases**) will be given an opportunity to make a statement and comment on the licensee's presentation.

 The complainant's personal representative does not normally participate in the conference unless they are providing comments for the complainant, such as an attorney responding to legal arguments put forward by the licensee.

5. The NRC may question the complainant regarding the complainant's statement.

6. After the complainant's presentation is complete, the licensee will have an opportunity to respond to the complainant's presentation.

7. The senior NRC official present will offer closing remarks and conclude the PEC.

c. Post Submittals (**discrimination only**)

1. Submittals from the licensee and complainant will not generally be accepted when the licensee and complainant have received redacted OI report prior to the conference.
2. The NRC will accept the licensee's response to a proposed NOV.

#### 6.4.4.4 PEC Summary

- a. After the PEC has been held, the staff should prepare a PEC Summary (see sample summary in Appendix D).
- b. The PEC transcript should be entered into the PDR; however, transcripts should not be released until after any associated enforcement action has been issued without the approval of the Director, OE.

#### 6.4.5 Enforcement Caucus

- a. After the conclusion of the PEC, the PEC transcript is distributed to appropriate staff and an enforcement caucus is scheduled.
- b. Depending on the information gathered during the PEC and the discussions in the caucus, the staff will determine one of several outcomes.
  1. OE will document its understanding of the enforcement strategy that has been agreed upon during the enforcement caucus by completing a Strategy Form and will follow the normal review process.
- c. For **discrimination cases**, OGC makes the determination, with staff input, whether:

1. By a preponderance of the evidence, the protected activity was a “contributing factor” in the unfavorable personnel action; or
2. The licensee provided “clear and convincing evidence” that a legitimate nondiscriminatory consideration was the only motive for the adverse action.

☞ Engagement in protected activities does not immunize employees from discharge or discipline for legitimate reasons or from adverse actions dictated by non-prohibited considerations.

#### 6.4.6 Enforcement Action and Severity Level Categorization

- a. Enforcement actions for wrongdoing and discrimination should follow the guidance specified in the Enforcement Policy and this manual. Examples of sanctions that may be appropriate include NCVs, NOVs, civil penalties, orders, or DFIs.
- b. Civil penalties are normally assessed for Severity Level I and II violations and are considered for Severity Level III violations.
- c. With the exception of violations against the deliberate misconduct rule, NOV “contrary to” paragraphs should **not** include the word “willful” or “deliberate misconduct.”
  1. The discussion of willfulness should be included in the cover letter as part of the significance discussion.
  2. Including “deliberate misconduct” in “contrary to” paragraphs is required when violations are based on the deliberate misconduct requirements.
- d. The statute of limitations applicable to NRC civil penalty cases requires that the NRC initiate an action imposing a civil penalty, issuing an order to modify, suspend, or revoke a license or an order to prohibit involvement in NRC licensed activity (enforcement sanction) within the five-year statutory period.

##### 6.4.6.1 Discretion

- a. Notwithstanding the outcome of the normal civil penalty assessment process addressed in the Enforcement Policy, the NRC may either:
  1. Propose a civil penalty where application of the normal process would otherwise result in zero penalty; or
  2. Propose a civil penalty greater than the amount resulting from application of the normal process (i.e., greater than the base or twice the base civil penalty).
- b. Exercise of this discretion:
  1. Ensures that the proposed civil penalty reflects the significance of the circumstances.
  2. Requires prior approval by the Director, OE, and the DEDO and consultation with the EDO, as warranted.

- c. It is recognized that there are some cases of **discrimination** where enforcement action may not be warranted, e.g.:
  - 1. When a licensee who, without the need for government intervention, identifies an issue of discrimination and takes prompt, comprehensive, and effective corrective action to address both the particular situation and the overall work environment is helping to establish a safety-conscious workplace; or
  - 2. When a complaint is filed with the DOL, but the licensee settles the matter before the DOL Area Office makes a finding of discrimination.
- d. Normally enforcement discretion would not be appropriate for cases that involve:
  - 1. Allegations of discrimination as a result of providing information directly to the NRC;
  - 2. Allegations of discrimination caused by a manager above first-line supervisor (consistent with the current Enforcement Policy classification of Severity Level I or II violations);
  - 3. Allegations of discrimination where a history of findings of discrimination (by the DOL or the NRC) or settlements suggest a programmatic rather than an isolated discrimination problem;
  - 4. Allegations of discrimination which appear particularly blatant or egregious; and
  - 5. Cases where the licensee does not appropriately address the overall work environment (e.g., not using training, postings, revised policies or procedures, any necessary disciplinary action, etc., to communicate corporate policy against discrimination).

#### 6.4.6.2 Enforcement Sanction (Discrimination Only)

- a. The particular sanction to be issued for a discrimination violation should be determined on a case-by-case basis.
- b. The Enforcement Policy includes examples of Severity Level I, II, and III violations based on discriminatory acts by senior corporate management, plant management or mid-level management, and first-line supervision or other low-level management, respectively.
  - 1. Notwithstanding an individual's specific job title or relationship to the person subject to discrimination, severity level categorization should consider several factors, including:
    - (a) The position of the individual relative in the licensee's organization;
    - (b) The individual's responsibilities relative to licensed activities; and
    - (c) The potential chilling effect that the action could have on the licensee's organization based on the individual's position.
  - 2. Where the level of a supervisor is concerned, e.g., first-line supervisor versus plant management, the supervisor's sphere of influence is a guide to determining the appropriate severity level. While a vice president is the direct supervisor for only a few



employees, the vice president's sphere of influence is great and the impact of his or her decision could affect the atmosphere throughout the site.

- (a) The examples in Supplement VII are provided as a guide;
  - (b) The final severity level categorization for discrimination actions should reflect the regulatory concern the cases represent, e.g., a second-line supervisor may not necessarily be appropriately categorized at Severity Level II when there are multiple levels of management.
- c. Supplement VII of the Enforcement Policy also includes an example of a Severity Level II violation involving a hostile work environment.
- 1. Such a violation may be very significant because the failure by a licensee's management to correct a hostile work environment can have a potentially significant adverse impact on employees raising issues.
  - 2. In such cases, employees may not believe that they are free to raise concerns.
- d. Supplement VII of the Enforcement Policy also includes an example of a Severity Level III violation involving threats of discrimination or restrictive agreements.
- 1. Both of these examples are violations under NRC regulations such as 10 CFR 50.7(f).
  - 2. This type of violation is categorized at a Severity Level III because the potential impact on future protected activity may be of significant regulatory concern.
- e. Some discrimination cases may occur which, in themselves, do not warrant a Severity Level III categorization.
- 1. Example D.7 of Supplement VII is an example of a Severity Level IV violation to address these situations.
    - (a) An example of such a case might be a single act of discrimination involving a first-line supervisor, in which the licensee promptly investigates the matter on its own initiative, takes prompt, decisive corrective action to limit the potential chilling effect, and thereby provides a clear message to other supervisors and employees that such conduct will not be tolerated.
    - (b) Another example could involve a threat of adverse action against an employee for going around the supervisor to raise a concern; if the licensee took prompt, aggressive corrective action before any adverse action was taken toward the employee, such a case might be considered as having minimal potential for a widespread chilling effect.
    - (c) These cases would be categorized at a Severity Level IV because they are of more than minor concern and, if left uncorrected, could lead to a significant regulatory concern.

- (d) Severity Level IV violations would normally be considered for exercising enforcement discretion if warranted under Section VII.B.5. However, citations would normally be made if one of the four exceptions in that section were applicable.
- f. If a Commission paper is required for the enforcement action and the action is based on a decision and finding of discrimination by the DOL, the Commission paper must contain:
  - 1. A brief but reasonably precise description of the acts of discrimination;
  - 2. A brief summary of the DOL's (ALJ or Secretary of Labor) reasoning;
  - 3. Copies of the DOL decisions; and
  - 4. In cases where the staff differs with the DOL decision, the staff's reasons for differing.
- g. As additional findings of discrimination are reached, the NRC's response (in addition to any enforcement action) should escalate on the premise that a pattern may be developing.

#### 6.4.6.3 Continuing Violations (Hostile Work Environment) Involving Discrimination

- a. Most violations of prohibitions on discrimination, such as a discriminatory termination or a failure to grant a promotion as the result of engaging in protected activities, are not considered "continuing."
  - 1. An exception may apply to cases involving a hostile work environment (sometimes referred to as H&I).
    - (a) **Harassment and Intimidation** (H&I) is a course of conduct directed at a specific person that causes substantial emotional distress in such person and serves no legitimate purpose or words, gestures, and actions which tend to annoy, alarm and abuse (verbally) another person.
    - (b) **Intimidation** involves behavior(s) towards another person (words or actions) which causes them to be timid or fearful.
- b. A **hostile work environment** (refer to DOL Case Number 1999ERA00025; Overall v. TVA) exists when it is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment. The mere utterance of an epithet which engenders offensive feelings in an employee does not sufficiently affect the conditions of employment.
  - 1. Factors used to consider when determining whether conduct is sufficiently severe or pervasive include:
    - Frequency of the discriminatory conduct
    - Severity of the discriminatory conduct
    - Whether the discriminatory conduct is physically threatening or humiliating, or a mere offensive utterance

- Whether the discriminatory conduct unreasonably interferes with an employee's work performance
- 2. Usually acts of discrimination or a pattern of activities or events would need to be identified as having produced a hostile work environment.
  - (a) If, following the initiating event, the hostile environment persisted, a continuing violation may exist such that daily civil penalties may be appropriate for each day that the hostile work environment continued. This is an area in which the law is evolving.
  - (b) OE will consult with OGC on cases involving a hostile work environment or the potential for "continuing" discrimination.

#### **6.4.6.4 Enforcement Actions Against Licensees for Actions of Contractors**

- a. The Commission's long-standing policy has been and continues to be to hold its licensees responsible for compliance with NRC requirements.
  - 1. This is the case even if licensees use contractors for products or services related to licensed activities; therefore,
  - 2. Licensees are responsible for having their contractors maintain an environment in which contractor employees are free to raise concerns without fear of retaliation.
- b. Nevertheless, certain NRC requirements apply directly to contractors of licensees.
  - 1. See, for example, the rules on deliberate misconduct, such as 10 CFR 30.10 and 50.5 and the rules on reporting of defects and noncompliances in 10 CFR Part 21.
  - 2. The Commission's prohibition on discriminating against employees for raising safety concerns applies to the contractors of its licensees, as well as to licensees (see, for example, 10 CFR 30.7 and 50.7).
    - (a) If a licensee contractor discriminates against one of its employees in violation of applicable Commission rules, the Commission intends to consider enforcement action against both the licensee, who remains responsible for the environment maintained by its contractors, and the employer who actually discriminated against the employee.
    - (b) In considering whether enforcement actions should be taken against licensees for contractor actions, and the nature of such actions, the NRC intends to consider, among other things:
      - (1) The relationship of the contractor to the particular licensee and its licensed activities;
      - (2) The reasonableness of the licensee's oversight of the contractor environment for raising concerns by methods such as licensee's reviews of contractor policies for

raising and resolving concerns and audits of the effectiveness of contractor efforts in carrying out these policies, including procedures and training of employees and supervisors;

- (c) The licensee's involvement in or opportunity to prevent the discrimination; and
- (d) The licensee's efforts in responding to the particular allegation of discrimination, including whether the licensee reviewed the contractor's investigation, conducted its own investigation, or took reasonable action to achieve a remedy for any discriminatory action and to reduce potential chilling effects.

#### **6.4.6.5 Enforcement Actions Against Contractors and Individuals**

- a. The staff should consider in each case application of the deliberate misconduct rule against an individual or contractor found to have committed the act of wrongdoing.
- b. A demand for information or a PEC should normally be used for each case in which wrongdoing is found, to put the burden on the licensee and the individual supervisor to explain why they believe that an individual enforcement action should not be taken.
- c. Predecisional enforcement conferences or a demand for information should normally be used with contractors and their personnel where wrongdoing is caused by contractor personnel.

#### **6.4.6.6 Application of Corrective Action Civil Penalty Assessment Factor for Discrimination Violations**

- a. Application of the Corrective Action factor is discussed in the Enforcement Policy and this manual. The Enforcement Policy also provides an explanation of the Corrective Action factor as applied to discrimination cases.
- b. The NRC can require broad remedial action to improve the workplace environment.
  - 1. NRC cannot require a licensee to provide the individual with a personal remedy.
  - 2. DOL has the authority to require a licensee to provide the individual with a personal remedy.
- c. The Commission does not believe that a proposed penalty should be mitigated if a personal remedy is not provided (59 FR 60697, November 28, 1994).
  - 1. A violation involving discrimination is not completely corrected without the personal remedy.
  - 2. The chilling effect may continue if a personal remedy is not provided.
- d. Credit for Corrective Action should normally only be considered if the licensee takes prompt, comprehensive corrective action that:
  - 1. Addresses the broader environment for raising concerns in the workplace; and

2. Provides a remedy for the particular discrimination at issue.
- e. In the determination of whether or not a remedy has been provided, the NRC considers whether a settlement has been reached or if a remedy ordered by DOL has been implemented.
  1. Where a remedy has been accepted by DOL, NRC intends to defer to DOL on the adequacy of the remedy.
  2. Cases where a licensee offers an employee a reasonable remedy, but the employee declines, will be handled on a case by case basis.
- f. The promptness and scope of corrective action should also be considered in applying the Corrective Action factor.
  1. If settlement occurs early in the administrative process, credit may be warranted based on corrective actions as the chilling effect may have been minimized by the promptness of the remedy and remedial action.
  2. If settlement occurs after the evidentiary record closes before the Administrative Law Judge, credit normally would not be warranted because any existing chilling effect may have existed for a substantial time, and the complainant may have had to spend substantial resources to present his or her case.
  3. If the licensee does not take broad corrective action until after a Secretary of Labor's decision, and the Secretary's decision upholds an Administrative Law Judge's finding of discrimination, corrective action may be untimely making credit unwarranted.
  4. If the licensee chooses to litigate and eventually prevails on the merits of the case, then enforcement action will not be taken and, if already initiated, will be withdrawn.
  5. Assuming that evidence of discrimination exists, enforcement action that emphasizes the value of promptly counteracting the potential chilling effect is warranted.

#### **6.4.6.7 Program Fraud Involving Civil Penalties**

OI investigations have occasionally uncovered that licensees have engaged in program fraud, e.g., an OI investigation of a radiography licensee regarding its willful misuse of licensed materials reveals that the licensee is not, as it has claimed (and paid the license fees for), a small entity.

- a. OGC has the lead in for the program fraud aspect of such cases.
- b. Information about the program fraud aspect of the case should be coordinated with OE because as OE pursues the violation regarding the alleged misuse of licensed materials, the fact that the licensee has deliberately misled the agency may provide a context in which the seriousness of the violation is assessed.

#### **6.4.7 Processing Enforcement Actions**

### **6.4.7.1 Concurrence Chain**

- a. OE has the lead for all discrimination cases; as such all correspondence regarding discrimination cases are processed in OE and provided to the region for information only.
- b. For other wrongdoing cases, the applicable region has the lead and responsibility for issuance of any actions.
- c. OGC reviews and provides its no legal objection on all orders as well as wrongdoing enforcement actions.

### **6.4.7.2 Signature Authority**

The DEDO, Regional Administrator, or the Director, OE, has signature authority of the various actions depending on the severity and/or the license type.

### **6.4.7.3 Enforcement Notification**

- a. The Commission is provided a written Enforcement Notification (EN) (see forms in Appendix B) prior to issuing enforcement actions involving civil penalties, orders, and any case which the commission was previously consulted.
- b. OE prepares and/or issues ENs for enforcement actions that are submitted to and reviewed by OE.
- c. The Commission is consulted (SECY paper or memorandum) prior to taking action on:
  - 1. Proposals to impose a civil penalty for a single violation or problem that is greater than three times the Severity Level I value shown in Table 1A of the Enforcement Policy for that class of licensee.
  - 2. Any proposed enforcement action that involves a Severity Level I violation.
  - 3. Any enforcement action initiated more than 18 months after a violation is initially identified (based on the completion date of the inspection), or more than 18 months after referral of a potential violation to OI where the enforcement action in the case was affected or modified as a result of the age of the action and the EDO believes that Commission consultation is warranted.
- d. When an EN will be made publicly available in ADAMS, placement in ADAMS should be delayed seven days to ensure that the licensee has been notified of the action prior to the public availability of the action.

### **6.4.7.4 Press Release**

- a. Press releases are generally issued for civil penalties, orders, and in other enforcement cases as appropriate; however, the decision as to whether a press release will be issued rests with OPA.

1. The staff should notify the PAO at least 72 hours prior to issuance of an action with a proposed civil penalty.
- b. Press releases are normally issued to announce a PEC that is open to the public.
- c. Although press releases are not normally issued for escalated NOV's proposed without a civil penalty, there are two situations in which a press release will normally be issued:
  1. Where, but for the five-year statute of limitations, a civil penalty would have been proposed; and
  2. Where, but for the limitation of proposing a civil penalty against a vendor (i.e., could not establish that the violation was a knowing and conscious failure to notify the NRC in accordance with 10 CFR Part 21), a civil penalty would have been proposed.
- d. OPA may choose to issue a press release for escalated NOV's associated with an SDP finding.
- e. OPA may also choose to issue press releases for other enforcement actions that they view as newsworthy.

#### 6.4.8 Licensee Response to Agency Action

- a. **Civil Penalty:** The provisions of 10 CFR 2.205 require that a licensee submit a written response addressing the violations included within a civil penalty action within 20 days of the date of the civil penalty action or other specified time frame; however, normally 30 days should be used.
  1. Licensees may be granted response extensions where good cause is shown.
  2. The staff shall review the licensee's response and submit an acknowledgment letter or order imposing the civil penalty, as appropriate.
- b. **Order Imposing:** The provisions of 10 CFR 2.202 require that a licensee submit a written response to an order under oath or affirmation within 20 days of the date of the order or other specified time frame; however, normally 30 days should be used.
  1. A licensee may either:
    - (a) Pay the civil penalty; or
    - (b) Request a hearing.
  2. If a licensee does not respond to the order within the allotted time, the region should contact OE and the case will be referred to the Attorney General for collection. (Unless an individual receives an order, he/she is not entitled to a hearing)
  3. If a licensee requests a hearing, OE will provide the request to OGC to forward to the Office of the Secretary of the Commission.



4. Where good cause is shown, the staff may consider granting a licensee an extension of time to request a hearing. The request must:
  - (a) Be made in writing to the Director, OE; and
  - (b) Include a statement of good cause for the extension.
- c. **Settlement of Enforcement Proceedings Actions:** For those cases where a hearing has been requested, the staff is responsible for preparing a settlement agreement:
  1. Normally OGC has the lead.
  2. The stipulation or compromise is subject to approval by the designated presiding officer, or if none has been designated, by the Chief Administrative Law Judge.
  2. If approved, the ASLBP will issue a decision or order settling and discontinuing the proceeding that will include the terms of the settlement or compromise.
  3. For those cases that do not involve a hearing, the staff (normally OE) is responsible for preparing a settlement agreement (see forms in Appendix B).
    - (a) The settlement is subject to approval by the Director, OE after consultation, as warranted, with the DEDO.
    - (b) If approved, the staff (normally OE) will prepare an order settling, modifying, or discontinuing the enforcement action that will include the terms of the settlement or compromise (see forms in Appendix B).

#### 6.4.9 Closeout Letters

- a. Closeout letters primarily serve to document closure of an investigation, both to individuals involved in the investigation and in the NRC's enforcement records.
- b. Closeout letters are prepared and sent to individuals who have been considered for an individual enforcement sanction if the NRC determines that an individual enforcement action is not appropriate. Two scenarios exist:
  1. The individual engaged in deliberate misconduct, but the NRC determined that enforcement action was not warranted in accordance with the Enforcement Policy; or
  2. The individual did not engage in deliberate misconduct. This scenario encompasses examples of both careless disregard and insufficient evidence to prove deliberate misconduct.
  3. Individuals have been *considered* for enforcement if they are discussed at an enforcement panel. On a case-by-case basis, a closeout letter may be sent to the following individuals, particularly when the individual is not employed by the licensee or company that was the subject of the investigation:
    - (a) Individuals who were named in an OI report conclusion; and.

- (b) Individuals who were part of the investigation focus, but were not named in the report conclusion.
- c. Two forms of closeout letters are contained in Appendix B. The use of one or the other depends on whether the NRC concluded the individual engaged in deliberate misconduct or not, i.e., Form 45-I should be used for individuals when the NRC concludes the individual engaged in deliberate misconduct but enforcement action is not warranted. and Form 45-II should be used when the NRC concludes the individual did not engage in deliberate misconduct.
- d. Closeout letters are normally placed into ADAMS as sensitive, non-public documents.
  - 1. ADAMS Document Processing Template OE-001 specifies that sensitive and non-public documents restrict viewer rights to the ADAMS group OE-RPOES and other groups determined by the originating office.
  - 2. For closeout letters, the “other groups” are individuals who are on distribution or concur on a specific closeout letter and therefore may be included as a viewer. This ensures limited distribution and control of documents consistent with the Privacy Act.
  - 3. A copy of the closeout letter should also be maintained in the Individual Action Tracking System files and are placed on the license docket.

## 6.5 Discrimination for Engaging in Protected Activities (DOL Process)

- a. The NRC places a high value on nuclear industry employees being free to raise potential safety concerns, regardless of the merits of the concern, to both licensee management and the NRC.
- b. One of the goals of the NRC's Enforcement Policy is to ensure, through appropriate enforcement action against a licensee or licensee contractor (and when warranted, against the individual personally responsible for the act of discrimination), that employment actions taken against licensee or contractor employees for raising safety concerns do not have a chilling effect on the individual or others on the reporting of safety concerns.
- c. Section 211 (formerly section 210) of the ERA provides that no employer may discharge or otherwise discriminate against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee engaged in certain protected activities.


✎ Although licensees are responsible for the actions of their contractors, they are not required to specifically report to the NRC allegations that their contractors may have engaged in harassment, intimidation, or discrimination.

✎ For purposes of this guidance, **discrimination** should be broadly defined and should include intimidation or harassment that could lead a person to reasonably expect that, if he or she makes allegations about what he or she believes are unsafe conditions, the compensation, terms, conditions, and privileges of employment could be affected.

1. These protected activities include notifying an employer of an alleged violation of the AEA or ERA, refusing to engage in any practice made unlawful by those acts, testifying before Congress or in a Federal or State proceeding regarding any provision of these acts, or commencing, testifying, assisting, or participating in a proceeding under these acts.
  2. The NRC regulations that are related to the protection of whistle blowers include: 10 CFR 19.20, 30.7, 40.7, 50.7, 60.9, 61.9, 70.7, 72.10, and 76.7.
  3. In addition, 10 CFR Part 50, Appendix B, Criterion I provides that persons and organizations performing quality assurance functions shall have sufficient authority and freedom to identify problems and provide solutions.
- d. Allegations of discrimination can be made directly to the NRC, DOL, or both.

### 6.5.1 Memorandum of Understanding (MOU) Between NRC and DOL

- a. The MOU (published in the *Federal Register* on December 3, 1982) describes the responsibilities of the NRC and DOL in protecting the rights of employees as specified in Section 211 of the ERA.

 The MOU between the NRC and DOL is included on the Enforcement Web site. <http://www.nrc.gov/what-we-do/regulatory/enforcement/moudol.pdf>

1. Section 3 of the MOU provides that the two agencies will "...cooperate with each other to the fullest extent possible in every case of alleged discrimination involving employees of Commission licensees, applicants, or contractors or subcontractors of Commission licensees or applicants."
  2. If DOL receives a complaint concerning a possible violation of Section 211, it will promptly notify the NRC and inform the NRC whether DOL intends to investigate the matter.
  3. DOL will notify the NRC of the results of the Occupational Safety and Health Administration's (OSHA's) Notice of Determination (the results of the DOL investigator's conciliation effort and investigation), of the Recommended Decision and Order of the Administrative Law Judge (if the Notice of Determination is appealed by either party), and of the Final Order of the Secretary of Labor, rendered by the Administrative Review Board.
  4. The NRC will facilitate DOL's investigations by taking all reasonable steps to assist DOL in obtaining access to licensed facilities and any necessary security clearances.
- b. The procedures for implementing the MOU to ensure prompt notification, investigation, and followup of complaints involving alleged discrimination against employees who have contacted or attempted to contact the NRC, are included in the MOU.

### 6.5.2 Processing Discrimination Complaints Filed with NRC

- a. If an employee raises a concern directly to an NRC employee (rather than filing an allegation of discrimination with DOL), the NRC employee should be sensitive to his/her NRC responsibilities in this area.
- b. The NRC employee should make sure that the alleged understands that the NRC is concerned about the complaint(s), following the guidance in MD 8.8, "Management of Allegations."

### 6.5.3 Processing Discrimination Complaints Filed with DOL

The division of responsibilities between the two agencies for processing discrimination complaints that have been filed with the DOL is detailed in the following Sections.

#### 6.5.3.1 Department of Labor Process

- a. The Department of Labor is authorized by the Energy Reorganization Act to order personal remedies for an individual found to have been discriminated against by an NRC licensee.
- b. The NRC is not authorized to order personal remedies, but is responsible for regulating the nuclear industry and can take enforcement action against a licensee for discriminating against an employee for engaging in protected activities.
  1. In accordance with these different responsibilities, whereas the NRC may receive an anonymous allegation which it may decide to investigate and could later act on the findings, the DOL process starts when an individual files a complaint with the DOL seeking personal remedies.
- c. In accordance with the MOU between DOL and NRC, the DOL will send copies of official correspondence and decisions to the NRC to assist the NRC in tracking complaints of discrimination at licensed facilities.
- d. The NRC tracks these complaints through NRC-6, "Discrimination Cases," a system of records that has been noticed in the *Federal Register*.
- e. The following guidance describes the steps in the DOL process.
  1. **OSHA:** In accordance with Section 211 of the ERA, a complaint filed with DOL is first reviewed by OSHA to determine whether the complainant has established a *prima facie* case.

(a) If a *prima facie* case has been established:

- (1) OSHA will acknowledge the complaint by letter and assign a compliance officer to investigate the allegation;

☛ The information provided by DOL to the NRC, especially the compliance officers' narrative reports, should not be publicly released without the permission of DOL other than documents NRC knows to be public.

- (2) The compliance officer will interview individuals associated with the allegation of discrimination and compile a "narrative report" of these interviews; and
- (3) The compliance officer will make a recommendation as to whether discrimination occurred.
2. OSHA will issue a decision and will send copies of this decision to the complainant and his or her employer. Note that sometimes the employer of record is a licensee contractor and, in some cases, the licensee may not know at this point that a complaint was even filed against its contractor.
3. **Appeal:** An appeal of OSHA's decision can be filed within five days of the decision with the Office of Administrative Law Judges (ALJ). If no appeal is filed within that time, OSHA's decision is considered a final decision of the Secretary of Labor.
4. **Administrative Law Judge:** If there is an appeal, an "ERA" number will be assigned by DOL and the ALJ assigned to the case will schedule and conduct a hearing on the issues involved in the complaint. The ALJ will then issue a Recommended Decision and Order which can be appealed to the Secretary of Labor. If no appeal is sought by either party, the ALJ's decision becomes the final DOL decision.
5. **Secretary of Labor:** The Secretary of Labor will review the ALJ's Recommended Decision and Order, if one of the parties requests review. Where the Recommended Decision and Order finds discrimination and recommends relief, the Secretary is required to issue a preliminary order providing that relief, not including compensatory damages, pending the Secretary's decision on the matter. The Secretary, on May 3, 1996, delegated this authority to the Administrative Review Board of the Department of Labor.
6. **Additional Appeals beyond the Secretary of Labor:** The party against whom the Secretary rules may appeal the decision to U.S. Court of Appeals.
7. **Settlements:** The individual and the employer may settle the matter after a complaint is filed with the Department of Labor but before a final decision is reached by the DOL.

☞ If additional information is needed from the DOL, it can be requested using Form 29.

### 6.5.3.2 NRC Process

- a. The following guidance describes the steps of the NRC enforcement process in terms of the steps of the DOL process identified in the section above.
1. **OSHA**
- (a) If the complaint is withdrawn or settled before OSHA issues a

☞ If OI investigated the matter, it may not be necessary to wait until DOL completes its process.

✓ Before initiating enforcement action, the region should request a copy of the DOL compliance officer's narrative report and should coordinate the matter with OE and OE will consult OGC to determine if a CEL or enforcement action should be issued.


finding, or if OSHA concludes that the complaint was not timely filed, the NRC should review the complaint and any associated documents and an Allegation Review Board should be convened to determine whether an OI investigation is necessary.

- (b) If OSHA concludes that discrimination occurred and the licensee or contractor appeals the decision, the region should:
  - (1) Request a copy of the DOL compliance officer's narrative report; and
  - (2) Prepare a chilling effect letter (CEL).
- (c) If OSHA concludes that discrimination occurred and the licensee or contractor does not appeal the decision:
  - (1) It is considered a final order of the Secretary of Labor and
  - (2) Enforcement action may be appropriate.
- (d) If OSHA concludes that no discrimination occurred and the individual does not appeal the decision, the region should:
  - (1) Request a copy of the DOL compliance officer's narrative report.
  - (2) Review the report to ensure that the NRC can close the matter with no further action.
- (e) If OSHA concludes that no discrimination occurred and the individual appeals the decision, the staff should await the ALJ's Recommended Decision and Order.

## 2. Administrative Law Judge

- (a) After conducting a hearing, the ALJ will issue a Recommended Decision and Order. The Energy Policy Act of 1992 revised Section 211 of the ERA to, among other things, require the Secretary of Labor to issue a preliminary order providing certain relief specified by the ALJ while awaiting the final order of the Secretary.

- (b) If the ALJ finds that discrimination occurred and does not establish that the respondent would have taken the same action regardless of an employee's protected activities (respondent unable to show by clear and convincing evidence):

 If no appeal is filed (the 30 day appeal period should commence 10 business days after the ALJ's decision is rendered) the DOL decision becomes final.


- (1) OE should obtain an EA number and initiate the enforcement process.
- (2) The appropriate enforcement action should be issued following the issuance of the ALJ's Recommended Decision and Order.



- (3) OE should also consider whether it would be appropriate to take some action against the contractors or individual(s) found by the ALJ to be responsible for the discrimination
- (c) If the ALJ finds that discrimination occurred and it is appealed to the ARB, and there exists a completed and similarly factual OI investigation which does not substantiate discrimination:
  - (1) The NRC may await a decision by the ARB before initiating the enforcement process, however, a chilling effect letter should be processed.
  - (2) If a civil penalty is proposed, the enforcement action will require a response in accordance with the provisions of 10 CFR 2.201.
  - (3) The licensee's response to the provisions of 10 CFR 2.205 (i.e., payment of any civil penalty) should be delayed until 30 days after the DOL decision becomes final.
- (d) If the ALJ finds no discrimination, the NRC should await issuance of the Secretary of Labor's decision, if an appeal is filed.
- (e) If the ALJ dismisses the complaint for procedural reasons (withdrawal, settlement, or untimely), the region should:
  - (1) Review the record, including the earlier OSHA decision; and
  - (2) Determine whether it is appropriate to initiate the enforcement process, to request additional OI investigation, or wait for the ARB's ruling, if an appeal is filed.

### 3. Administrative Review Board (ARB)

- (a) If, on a timely appeal, the ARB affirms the ALJ's finding of discrimination:
  - (1) The licensee is expected to respond to any civil penalty already issued by the NRC.
  - (2) Although no specific action is required by the NRC at this point, OE should ensure that the licensee has received notice of the ARB Order, especially in cases in which the Respondent is a licensee contractor, to avoid a delay in the licensee's response.
  - (3) OE should initiate the enforcement process if not already done so.
- (b) If the ARB affirms the ALJ's finding of no discrimination, the region would normally close the case without further action.
- (c) If the ARB reverses the ALJ's finding that discrimination occurred and dismisses the case, the NRC normally would withdraw the enforcement action if it was based

 The Secretary of Labor has delegated responsibility for reviewing ALJ determinations to the ARB.



solely on the DOL process (i.e., without independent findings from an OI investigation that discrimination had occurred).

- (d) If the ARB reverses the ALJ's finding that no discrimination occurred, concluding instead that discrimination did occur, OE should obtain an EA number and initiate the enforcement process.
  - (e) If the ARB dismisses the case for procedural reasons, (withdrawal, settlement, or untimely), OE should review the record, including the earlier ALJ's decision, and determine whether earlier enforcement was appropriate, whether to impose the civil penalty, or withdraw the proposed civil penalty.
- 4. **Additional Appeals beyond the Secretary of Labor:** The party against whom the Secretary rules may appeal the decision to U.S. Court of Appeals. Absent a stay issued by the Court, the NRC enforcement action is not stayed. Therefore, the region should consult with OE in such cases.
  - 5. **Settlements:** The individual and the employer may settle the matter after a complaint is filed with the Department of Labor but before some final decision is reached by the DOL. In such cases, the NRC will normally need to develop the evidence to support an enforcement action if it is to prevail.

#### 6.5.4 Chilling Effect of Actual or Potential Discrimination

In addition to concerns about the appropriate enforcement action in cases of actual discrimination, the NRC must also consider the impact of such discrimination in the workplace, i.e., whether the awareness of the discriminatory act will discourage other licensee and contractor employees from raising safety concerns.

##### 6.5.4.1 Chilling Effect Letter (CEL)

- a. In each case of a finding of discrimination, the NRC should bring the matter to the attention of the licensee. This correspondence, referred to as a chilling effect letter (CEL), serves three purposes:
  - 1. To notify the licensee of the NRC's concern,
  - 2. To understand the basis for the licensee's position on whether or not discrimination occurred, and
  - 3. To obtain a description of any remedial action the licensee plans to take to address the potential chilling effect. Remedial action may be warranted, even if the licensee disagrees with the finding of discrimination, because of the potential for a chilling effect.
- b. The NRC should normally issue a CEL after the OSHA investigation has been completed and a finding has been made of discrimination.
  - 1. If the licensee settles a case soon after the OSHA finding and does not challenge the finding in an adjudication, the chilling effect may be minimized and a CEL need not be issued.

2. If OSHA finds that discrimination did not occur and subsequently the ALJ reverses the OSHA finding, concluding instead that discrimination did occur, the NRC may:
  - (a) Await the ARB final decision before taking enforcement action; and
  - (b) While awaiting the ARB decision, a CEL is usually an appropriate response to the ALJ finding of discrimination.
- c. Once a finding of discrimination is made by either the ALJ or the ARB, and neither the respondent nor the claimant appeals to the next higher level, the NRC will:
  1. Evaluate whether to take enforcement action; and
  2. If enforcement action is initiated based solely on a DOL finding, the NRC will normally issue a choice letter, instead of a CEL, since the choice letter, like the CEL, requires the licensee to address the violation and corrective actions.
- d. The CEL requires that the licensee describe:
  1. Its position regarding whether the actions affecting the individual violated 10 CFR 50.7 (or other requirement) and the basis for its position, including the results of any investigations it may have conducted to determine whether a violation occurred; and
  2. The actions taken or planned to ensure that the matter is not having a chilling effect on the willingness of other employees to raise safety and compliance concerns within its organization, and as discussed in NRC Form 3, to the NRC.
- e. The licensee's response to the CEL is mandatory under the provisions of the AEA, 10 CFR 2.204, "Demand for information," and the applicable provisions of Title 10 implementing Section 182 of the AEA.
- f. When a CEL is to be issued:
  1. The staff should request an EA number which allows OE and the region to track CELs for each licensee.
  2. Any subsequent enforcement action proposed will be given a separate EA number.
  3. The EA number should be closed upon issuance of the CEL itself; therefore, the region must send a copy of the letter to OE.
  4. OE should be included on concurrence of the CEL.
- g. There may be special cases involving allegations of a chilled work environment in which no DOL complaint or finding has occurred, where issuance of a CEL is appropriate.

✓ Because the CEL in this case is in response to an allegation or inspection finding versus a DOL finding, NRC OI investigation, or NRC inspection, Form 28 in Appendix B should NOT be used to draft the CEL.

1. The region should consult with OE to discuss the issuance of a CEL and determine the appropriate coordination with OE.
2. Because the CEL in this case is in response to an allegation or inspection finding versus a DOL finding, NRC OI investigation, or NRC inspection, the letter should not include the mandatory licensee response language in a traditional CEL (i.e., DFI).
3. The CEL should address the NRC's concerns and request a response from the licensee.

#### 6.5.4.2 Numerous DOL Settlements Without Findings of Discrimination

- a. If a licensee has numerous cases which end in settlement agreements before DOL reaches a finding of discrimination at any level, the region should consider whether this is:
  - (1) Indicative of true, though uninvestigated, discrimination; or
  - (2) A chilling effect.
- b. The NRC must be careful when reaching such conclusions that the agency is not perceived as discouraging settlements.

### 6.6 Enforcement and Administrative Actions Involving Individuals

- a. The subject of enforcement actions involving individuals is addressed in the Enforcement Policy.
- b. Enforcement actions involving individuals, including licensed operators, are significant actions that will be closely controlled and judiciously applied.
- c. An enforcement action involving a licensed individual will normally be taken only when the NRC is satisfied that the individual:
  1. Fully understood, or should have understood, his or her responsibility;
  2. Knew, or should have known, the required actions; and
  3. Knowingly, or with careless disregard (i.e., with more than mere negligence) failed to take required actions which have actual or potential safety significance.
- d. Action may be taken directly against individuals (licensed or un-licensed) who engage in deliberate misconduct that causes or would have caused, if not detected, a licensee to be in violation of any rule, regulation, or order related to NRC-licensed activities (e.g., 10 CFR 50.5).

☞ Normally, whenever action is taken against an individual, action is also taken against a licensee.

- e. The NRC may take enforcement action against a licensee that may impact an individual, where the conduct of the individual places in question the NRC's reasonable assurance that licensed activities will be properly conducted.
  - 1. The NRC may take enforcement action for reasons that would warrant refusal to issue a license on an original application. Accordingly, appropriate enforcement actions may be taken regarding matters that raise issues of integrity, competence, fitness-for-duty, or other matters that may not necessarily be a violation of specific Commission requirements.
  - 2. Enforcement actions against licensed operators for failure to meet fitness-for-duty requirements are addressed in this manual.
- f. Because potential enforcement actions and administrative actions involving individuals are significant actions, the Director, OE, is to be notified as soon as the staff identifies any violation or issue that could lead to an enforcement or administrative action against an individual.
- g. In those cases where the staff believes enforcement action against an individual may be warranted, the NRC will normally provide the individual with an opportunity to address the apparent violations by:
  - 1. Responding to a choice letter; or
  - 2. Participating in a PEC, unless the circumstances of the case warrant immediate NRC action.
- h. There may also be cases in which the staff proposes to issue a demand for information (DFI) in lieu of, or in addition to, conducting a PEC.
- i. When issuing an action against an individual:
  - 1. If the individual is employed by the licensee, a copy of the action should be sent to the licensee.
  - 2. If the individual is no longer employed by the licensee, a copy of the action is not sent to the licensee.
  - 3. A copy of the action is placed on the Enforcement Web page.
    - (a) NOVs should remain on the Enforcement Web page for one year from the date they are issued.
    - (b) Orders should remain on the Enforcement Web page until all conditions of the order has been met, including, as stipulated in the order, the length of time the order is to remain in effect.
  - 4. Enforcement Specialists should enter actions against individuals in the Action Items Tracking System (AITS) with, e.g., in the case of NOVs, a year deadline, to ensure that actions that have been placed on the Enforcement Web pages will be removed in a timely manner.

### 6.6.1 Individual Action (IA) Numbers

- a. Individual Action (IA) numbers are assigned by OE to administratively track and file all correspondence issued to an individual, if that individual is being considered for or has been issued an enforcement action.
- b. IA numbers should be used on all close-out letters and on conference or choice letters, but never on correspondence containing the corresponding EA numbers.
- c. The region should use an EA number for the review and approval stages and get an IA number from OE when the correspondence is ready to be issued.
  - 1. The EA number should never appear on the correspondence/enforcement action issued with an IA number; nor, should it appear in the ADAMS profile.
  - 2. The EA file should be closed upon issuing the final IA action.

### 6.6.2 Predecisional Enforcement Conferences Involving Individuals


- a. Once the staff determines that a individual PEC should be conducted,
  - 1. OE will assign the case an EA number if one has not previously been assigned.
  - 2. The staff should contact OE to obtain an IA number to include on a conference or choice letter or DFI when the correspondence is ready to be issued.
  - 3. Although the original EA number should be used for any subsequent action or close-out letter during the review and approval stages, the IA number should be used on the final correspondence to the individual.
- b. For cases where the focus of regulatory concern is the licensee but a specific individual or individuals are involved, when the staff contacts the licensee to schedule the conference, the staff should make clear to the licensee the agency's desire to have the individual or individuals attend.
- c. Letters to the licensee that describe apparent violations involving the individual should avoid publicizing the individual's identity. If necessary, the apparent violation may be described in an attachment to the letter, and the letter made available to the public without the attachment.
- d. Written correspondence concerning the PEC should normally not be made public (ADAMS (PARS)) in a manner that identifies the individual. The identification of the individual should be withheld from the public pending the issuance of any enforcement action, including a DFI.
- e. For PECs involving only the individual, the letter requesting the conference should have an IA number and include:
  - 1. A clear statement of the purpose of the conference, the time and date agreed upon, and any apparent violations to be discussed.

2. A copy of the inspection report or the OI report factual summary should be enclosed if available.
3. A copy of the transcript of the individual's OI interview may be included, if the individual (or individual's attorney) requests it to prepare for the conference and the OI investigation has been completed and is closed.
  - (a) The Director, OI, and Director, OE, should be consulted in these cases.
  - (b) The transcript of the individual's OI interview will not be made available thru a FOIA requests until after the enforcement action is issued.
4. A description of the information that the individual is expected to address.
5. A description, in general terms, of the range of possible enforcement actions that the NRC is considering.
6. A statement that the individual is **not required** to attend the conference, and that, should the individual choose not to attend, the NRC intends to proceed based on the facts already at hand.
7. A statement that the individual may choose to bring a personal representative; however, if the individual desires to bring more than one representative, the individual should contact the NRC in advance of the conference.
8. A point of contact who can answer any questions about the conference.
- f. As with other PECs, a meeting notice should be issued when an individual is involved; however, care should again be taken for privacy considerations.
  1. The meeting notice should avoid using names or titles in a manner to implicate a particular individual as being the focus of the conference.
  2. For a conference in which only the individual and his/her representative(s) will be attending (i.e., no licensee representatives), the meeting notice should use a general designation (e.g., "Diablo Canyon employee") rather than the individual's name or specific title.
- g. Predecisional enforcement conferences involving individuals normally will be closed and should be transcribed.
  1. Consideration should be given to having NRC counsel (regional or OGC) present.
  2. An OE staff member should also attend the more significant conferences and for all cases involving discrimination.
  3. For a conference involving only the individual, the NRC may allow limited licensee attendance only if the individual who is the subject of the conference so desires. NRC attendance at these conferences should also be limited.

- h. Appendix D includes opening remarks for a PEC with licensed operators. While use of the remarks is not mandated, they cover important issues that should be addressed. The presiding official should consider these remarks and adjust them as appropriate for conferences with unlicensed individuals.
- i. If the individual chooses to bring a personal representative (usually an attorney, spouse, or relative), the NRC should make it clear at the outset of the conference that the purpose of the meeting is to receive information from the individual and understand the individual's perspective. As such, the NRC's questions should primarily be addressed to and answered by the individual.
- j. Subsequent to the PEC, the region and/or OE should determine, whether enforcement action should be issued against the facility licensee, against the individual, or both (See guidance below).

### 6.6.3 Action Against the Licensee or Against the Licensee and the Individual

- a. When a potential enforcement issue involves an individual, the decision must be made whether to cite solely against the licensee or cite against the individual and the facility licensee.
  - 1. Action against an individual will not be taken if the individual's improper action was caused by management failures.
  - 2. Most transgressions of individuals involving Severity Level III or IV violations will be handled by citing only the facility licensee.
- b. **CITE SOLELY AGAINST THE FACILITY LICENSEE.** The following examples of situations illustrate when the NRC will cite only the facility licensee:
  - 1. Inadvertent individual mistakes resulting from inadequate training or guidance provided by the facility licensee.
  - 2. Inadvertently missing an insignificant procedural requirement when the action is routine and fairly uncomplicated, and where no unusual circumstance exists indicating that the procedures should be referred to and followed step-by-step.

 NOVs are issued to facility licensees to recognize their responsibility for the conduct of their employees.
  - 3. A case in which compliance with an express direction of management, such as the Shift Supervisor or Plant Manager, resulted in a violation.
  - 4. Individual error directly resulting from following the technical advice of an expert unless the advice was clearly unreasonable and the licensed individual should have recognized it as such.



5. Violations resulting from inadequate procedures unless the individual used a faulty procedure knowing it was faulty and did not attempt to have the procedure corrected.
- c. **CITE INDIVIDUAL (LICENSED OR UNLICENSED) & THE FACILITY LICENSEE:** Serious violations, including those involving the integrity of an individual (e.g., lying to the NRC) concerning matters within the scope of the individual's responsibilities, will be considered for enforcement action against the individual as well as against the facility licensee.
1. Listed below are examples of situations which could result in enforcement actions involving individuals, licensed or unlicensed. If the actions described in these examples are taken by a licensed operator or taken deliberately by an unlicensed individual, enforcement action may be taken directly against the individual.
  2. Violations involving willful conduct not amounting to deliberate action by an unlicensed individual in these situations may result in enforcement action against a licensee that could impact an individual.
  3. The situations include, but are not limited to, violations that involve:
    - Willfully causing a licensee to be in violation of NRC requirements
    - Willfully taking action that would have caused a licensee to be in violation of NRC requirements but did not because it was detected and corrective action was taken
    - Recognizing a violation of procedural requirements and willfully not taking corrective action
    - Willfully defeating alarms which have safety significance
    - Unauthorized abandoning of reactor controls
    - Dereliction of duty
    - Falsifying records required by NRC regulations or by the facility license
    - Willfully providing, or causing a licensee to provide, an NRC inspector or investigator with inaccurate or incomplete information on a matter material to the NRC
    - Willfully withholding safety significant information rather than making such information known to appropriate supervisory or technical personnel in the licensee's organization
    - Submitting false information designed to allow a person to gain access to a licensee facility or, as a result, allowed a person to gain unescorted access to a licensee facility
    - As a contractor or other person who provides testing or other services, willfully providing false data to a licensee, when the data affects the licensee's compliance with 10 CFR Part 50, Appendix B, or other regulatory requirement
    - Willfully providing false certification that components meet the requirements of their intended use, such as an ASME Code
    - As vendors of equipment for transportation of radioactive material, willfully supplying casks that do not comply with their certificates of compliance
    - Willfully performing unauthorized bypassing of required reactor or other facility safety systems
    - Willfully taking actions that violate TS LCOs (enforcement action for a willful violation will not be taken if the operator meets the requirements of 10 CFR 50.54(x), i.e., if the operator acted reasonably considering all the relevant circumstances surrounding the emergency)

- d. **CITE THE INDIVIDUAL (UNLICENSED) & THE FACILITY LICENSEE:** In deciding whether to issue an enforcement action to an unlicensed person in addition to the facility licensee, the following factors should be considered:
1. The level of the individual within the organization;
  2. Whether the violation was willful;
  3. The individual's training, experience, and knowledge of the potential consequences of the wrongdoing;
  4. The potential safety or common defense and security consequences of the misconduct;
  5. The actual safety or common defense and security consequences of the misconduct;
  6. The benefit to the wrongdoer (e.g., personal or corporate gain);
  7. The degree of supervision of the individual (i.e., how closely the individual is monitored or audited, and the likelihood of detection...such as a radiographer working independently in the field as contrasted with a team activity at a power plant);
  8. The employer's response, including disciplinary action taken;
  9. The attitude of the wrongdoer (e.g., admission of wrongdoing, acceptance of responsibility);
  10. The degree of management responsibility or culpability; and
  11. Who identified the misconduct.

#### 6.6.4 Action Against the Individual

- a. The particular sanction(s) to be issued to an individual should be determined on a case-by-case basis.
- b. In determining the appropriate sanction against an individual, factors to be considered are listed in Appendix D, including, e.g.:
  1. The level of the individual within the organization;
  2. Whether the violation was willful;
  3. The actual safety or common defense and security consequences of the misconduct; and
  4. The attitude of the wrongdoer.
- c. All correspondence issued to an individual should include an IA number.
- d. If the NRC determines that action will not be taken against an individual (for whatever reason) the staff should prepare a close-out letter using the appropriate form in Appendix B.

- e. In accordance with the Enforcement Policy, an individual should normally have an opportunity to address apparent violations being considered for escalated enforcement action either in a PEC or in a choice letter.
  - 1. In some cases, a DFI may be appropriate.
  - 2. If the person has not had an opportunity to dispute the NRC's proposal, the action should give the individual an opportunity to dispute the action, including the underlying facts, and include an NRC contact and telephone number.

#### 6.6.4.1 Sanctions Issued to Individuals

- a. NOV's may be issued to licensed or unlicensed individuals.
  - 1. An NOV need not require a response from the individual if the action is being issued at Severity Level IV to a low-level individual who has been terminated from employment involving licensed activities because, in such cases, there is normally not much corrective action that an individual could take; however, an opportunity for the individual to respond is to be provided.
  - 2. With the exception of violations against the deliberate misconduct rule, NOV "contrary to" paragraphs should **not** include the word "willful" or "deliberate misconduct."
    - (a) Discussion of willfulness should be included in the cover letter as part of the significance discussion.
    - (b) Including "deliberate misconduct" in "contrary to" paragraphs is required when violations are based on the deliberate misconduct requirements.
- b. Orders.
  - 1. In the case of NRC-licensed reactor operators, such orders may involve suspension for a specified period, modification, or revocation of their individual licenses.
  - 2. In the case of unlicensed individuals, such orders may include provisions that prohibit involvement in NRC licensed activities for a specified period of time or until certain conditions are satisfied (e.g., completing specified training or meeting certain qualifications).
  - 3. Once a determination is made to issue an order banning involvement in NRC licensed activities, the length of the ban must be determined.
    - (a) Typically, bans are fixed for one, three, and five years (unless the ban is in place until certain conditions are satisfied).
    - (b) Two factors should be considered when determining the length of a ban:
      - (1) The position of the individual; and
      - (2) The significance (or potential significance) of the underlying violation.

4. Orders generally require:
  - (a) Notification to the NRC before the person resumes working in licensed activities; or
  - (b) The person to tell a prospective employer or customer engaged in licensed activities that the person has been subject to an NRC order.
- e. Civil penalties which may be assessed of an NRC-licensed operator.
  1. Section 234 of the Atomic Energy Act (AEA) gives the Commission authority to impose civil penalties on "any person."
    - (a) Such cases are rare and require Commission approval.
    - (b) Except for individuals subject to civil penalties under Section 206 of the Energy Reorganization Act of 1974, the NRC will not normally impose a civil penalty against an individual.
- f. Demands for Information (DFIs) which can be made to an individual for the purpose of enabling the NRC to determine whether an order or other enforcement action should be issued.
  1. A DFI is a formal request for information that can be made to an individual for the purpose of enabling the NRC to determine whether an order or other enforcement action should be issued.
  2. An individual to whom the NRC has issued a DFI may, in his or her discretion, respond to a DFI by filing a written response under oath or affirmation.
  3. All DFIs should provide an opportunity for the individual to challenge the underlying facts, including any (apparent) violations.

### 6.6.5 Action Against the Facility Licensee

The particular sanction to be issued to a facility licensee should be determined on a case-by-case basis.

- a. Most transgressions of individuals involving Severity Level III or IV violations will be handled by citing only the facility licensee.
- b. In accordance with the Enforcement Policy, the NRC may disposition a licensee-identified Severity Level IV willful violation involving a low-level individual as an NCV.
- c. NRC-identified willful violations involving individuals (regardless of the severity level) should always be cited in an NOV.
- d. Notwithstanding the outcome of the normal civil penalty assessment process, the Enforcement Policy provides that discretion will be considered (i.e., proposing or increasing the amount of a civil penalty) for willful violations.

### 6.6.5.1 Sanctions Issued to Facilities

- a. NOVs, with the exception of violations against the deliberate misconduct rule, should **not** include the word “willful” or “deliberate misconduct” in the NOV “contrary to” paragraphs. In such cases, the discussion of willfulness should be included in the cover letter as part of the significance discussion.
- b. DFIs may be issued to a licensee or applicant to obtain information regarding the competence or integrity of a particular licensee employee to determine whether the license should be granted, or if issued, whether it should be modified, suspended, or revoked, or other enforcement action taken.
  1. Cover letters and DFIs should include individuals’ titles, but should not include individuals’ names.
  2. Licensees should not get copies of DFIs that may be issued to the subject individuals, because the NRC has not made final, public conclusions about the individuals.
  3. Individuals who are the subject of DFIs should receive a copy of the action sent to the licensee.
- c. Orders modifying the facility license may be issued in the case of an unlicensed person, whether the unlicensed person is a firm or an individual, to require:
  1. The removal of the person from all licensed activities for a specified period of time or indefinitely;
  2. Prior notice to the NRC before utilizing the person in licensed activities;
  3. Notice of the issuance of such an order to other persons involved in licensed activities making reference inquiries; or
  4. Conditions to employers which require, e.g., retraining, additional oversight, or independent verification of activities performed by the person, if the person is to be involved in licensed activities.
- d. CALs may be used instead of orders if the licensee is told that an individual may not use licensed material because the individual:
  1. Is not named on the license;
  2. Does not meet the Commission requirements; or

✓ Including “deliberate misconduct” in “contrary to” paragraphs is required when violations are based on the deliberate misconduct requirements.

✓ Individuals who are the subject of orders should receive a copy of the action sent to the licensee.

3. Where the licensee has already, on its own, removed an individual and the NRC only seeks to be informed of any decision to reinstate that individual and the basis for that decision.
  - (a) Such a CAL should state clearly that the agreement does not require NRC approval for reinstatement.
  - (b) In such cases the person, under existing license conditions or regulations, lacks authorization to be involved in the licensed activity, and the CAL is merely being used to confirm that the licensee will adhere to existing provisions (i.e., in such a situation the CAL would not affect the individual's rights).
- e. When the NRC takes an enforcement action against a licensee because of an individual employee's action, and that enforcement action may affect the employment of the individual, the individual may have rights to a hearing.
  1. NRC employees may be individually liable for infringing on a person's constitutional rights.
  2. If the NRC concludes that an individual should be removed from licensed activities, an order is to be used rather than an informal action, such as a CAL, to clearly establish the opportunity for a hearing.

#### **6.6.6 Actions Concerning Individuals Licensed by Other Authorities**

- a. Some enforcement actions are taken against individuals who are licensed by other authorities.
  1. The most common cases are enforcement actions taken against physicians who are licensed by individual State licensing boards.
  2. Others who may be subject to NRC action and are licensed by a State board include, e.g., nurses, medical technologists, professional engineers, and attorneys.
- b. If an order is issued against an individual who is licensed (or registered) by a State, the issuing office should send a copy of the order to the licensing authority for the State.
  1. The transmittal letter to the individual should show the State on the "cc" list.
  2. In addition, a copy of the enforcement action against a physician should be sent to:

Federation of State Medical Boards  
of the United States, Inc.  
400 Wiser Road, Suite 300  
Euless, Texas 76039

    - (a) The Federation is a central repository that maintains the Physician Disciplinary Data Bank.
    - (b) The transmittal letter to the physician should show the Federation on the "cc" list.

- c. If the region intends to forward an order issued against an individual to a State licensing authority and/or the Federation, it should highlight this intent in the Enforcement Action Worksheet included with the region's recommended proposed enforcement action to OE.
- d. It is **imperative** that if after issuance of the action, NRC changes its position on the matter, a copy of the NRC revised position be forwarded to the same licensing authority and the Federation, as applicable.

### 6.6.7 Coordination and Review for Actions Involving Individuals

- a. Any proposed order (other than a confirmatory order) or civil penalty to be issued to an individual requires the concurrence of the Director, OE, and the DEDO.
- b. A confirmatory order, NOV without a civil penalty, NCV, or any proposed administrative action (CAL, DFI, LOR, or similar letter) directed to an individual requires appropriate coordination with OE prior to issuance.

### 6.6.8 Notification, Mailing, & Distribution of Actions Involving Individuals

#### a. Action Against the Individual:

- 1. In order to afford individuals the opportunity to address apparent violations before issues are made public, enforcement actions against individuals may be subject to a 45-day hold period, as discussed further below.
- 2. When NOVs and LORs are issued to individuals, they may be made available to the public (and posted to the Enforcement Web site (for escalated NOVs)) **ONLY** if the individual has previously had an opportunity to present his or her views on the facts of the case to the NRC.
- 3. When NOVs and LORs are issued to individuals the actions should **NOT** be made available to the public or the licensee, when it is sent to the individual, if the individual has not been given an opportunity to present his or her views on the facts of the case to the NRC, such as during a PEC, in response to a choice letter or a previously issued DFI, or during an OI investigation in which the individual was specifically provided an opportunity to challenge the alleged wrongdoing.
  - (a) In these cases, the action should provide the individual with an opportunity to respond within 30 days.
  - (b) The action should state that after 45 days the action will be sent to the licensee and made available to the public, unless the individual provides a sufficient basis to withdraw the action
- 4. A copy of the action should be distributed only to OE and those offices with a need for the document.



5. In cases where an enforcement action is being proposed for a licensee based on the actions of the individual, the enforcement action against the licensee should be withheld for at least 45 days while the individual is given the opportunity to respond.
6. If an individual provides a sufficient basis to withdraw an action, the staff should issue a close-out letter to the individual stating that the action will be withdrawn.
7. When the staff issues a close-out letter to the individual stating that an action will be withdrawn, the staff should also review the proposed action for the licensee to consider whether it remains appropriate based on the individual's response.
8. If an individual does not respond to the action or fails to provide a sufficient basis to withdraw the action, the responsible office (the region or OE) should ensure that the action (and the individual's response, if one was provided) are distributed to the licensee and made available to the public 45 days after the action was issued.
9. For an action subject to the 45-day hold, the region will forward a hard copy only to OE; and when the final enforcement decision is made, forward the electronic version to OE for posting on the Enforcement Web site (i.e., the region is responsible for tracking the 45-day hold period).
10. PEC letters, choice letters, and DFIs should only be made public if the agency concludes that enforcement action should be issued to the individual. These documents should be made public at the time the action is made public.
11. Close-out letters that are issued to individuals are not made available to the public (although they remain subject to release under FOIA). Close out letters to licensed individuals are placed on the license docket.
12. The region is responsible for mailing and distributing NOV's, civil penalties, LORs, and close-out letters to individuals for willful violations other than those cases involving discrimination.
13. OE is responsible for mailing and distributing DFIs and orders against individuals. Actions should be mailed by either Certified Mail (Return Receipt Requested) or Express Mail.
14. OE should be on distribution for all actions issued to individuals, including close-out letters. In addition, the facility licensee should be shown on the "cc" for all actions issued to individuals.
15. The issuing office should attempt to notify the individual by telephone when it is issuing an individual action. This is especially important when an order is being issued.
16. The region must ensure that the copies of actions against individuals and related documents that are made available to the public do not include individuals' home addresses.
17. Press releases that address individual actions and enforcement actions may be issued sooner than the normal five-day ADAMS hold after the staff has confirmed that the individual has received the action.

18. Exceptions to the above process will be considered on a case-by-case basis by the Director, OE.

**b. Action Against the Facility Licensee:**

1. Actions issued to licensees should be mailed in accordance with the normal guidance included within the applicable sections of this manual.
2. If an enforcement action is being proposed for a licensee in conjunction with an individual action, then the enforcement action against the licensee should be withheld for at least 45 days while the individual is given the opportunity to respond.
  - (a) If an individual subsequently provides a sufficient basis to withdraw the action, the staff should review the proposed action for the licensee to consider whether it remains appropriate based on the individual's response.
3. Individuals who are the subject of DFIs or orders that are issued against the facility licensee should receive a copy of the action that is sent to the licensee.
  - (a) The transmittal letter to the licensee should include language such as, "A copy of this letter and its enclosure(s) is being sent to (name or title of individual). The individual is not required to provide a response to the Demand, (order) but may do so if he or she desires within\_\_ days under oath or affirmation."
  - (b) The transmittal letter to the licensee should also include the individual's name on the "cc" list.
4. Exceptions to the above process will be made on a case-by-case basis by the Director, OE.

### **6.6.9 Orders Restricting NRC-Licensed Activities and Requiring Notice of New Employment**

- a. Orders to unlicensed individuals may include provisions that prohibit involvement in NRC licensed activities:
  1. For a specified period of time (normally the period of suspension would not exceed five years); or
  2. Until certain conditions are satisfied (e.g., completing specified training or meeting certain qualifications).
- b. Although not routinely used, under certain circumstances, orders to unlicensed individuals may include provisions that:
  1. Require notification to the NRC before resuming work in licensed activities, or
  2. Require the person to tell a prospective employer or customer engaged in licensed activities that the person has been subject to an NRC order.

- c. Orders to NRC-licensed reactor operators may involve suspension for a specified period, modification, or revocation of their individual licenses.
- d. In order to have current information available to those who make licensing and other decisions, OE includes orders to individuals on the Enforcement Web site within the collection of significant enforcement actions to individuals at:  
<http://www.nrc.gov/reading-rm/doc-collections/enforcement/actions/individuals/index.html>.
- e. OE includes any subsequent actions, such as modifications by the official authorized in the order to relax its requirements and settlements.
- f. A list of individuals who are currently subject to restrictions is included in the System of Records, NRC-3 Enforcement Actions Against Individuals, and the list can be made available to the public.
  - 1. Distribution of the list is consistent with the Commission's direction when the Deliberate Misconduct Rule took effect in 1991 that a list be made available. The list is distributed to assist:
    - (a) Those persons who are involved in licensing activities in making decisions as to whether an individual may be engaged in licensed activities; and
    - (b) NRC staff members in responding to inquiries concerning individual actions.

**g. Employment Restrictions**

- 1. Generally, before relying on information from the Enforcement Web site to deny a licensing action or to initiate any contact with or to respond to an inquiry from an employer concerning a prior wrongdoer, the staff should contact OE by telephone or e-mail to verify the information.
- 2. For licensing actions, license reviewers should check the Enforcement Web site before recommending issuance of a license that lists individuals by name, such as RSO, authorized user, etc.

✓ If it appears that a restricted individual is seeking to be involved in licensed activities, a compliance issue is raised and OE should be consulted.

  - (a) If any name on the proposed license or amendment matches a restricted individual, the branch chief should be consulted immediately and then OE should be advised.
  - (b) Since several people may have the same name, staff should review the order to see if the work history confirms or excludes a match of the individual.

**h. Notice to NRC of New Employment**

- 1. Many orders issued to individuals also require the individual to notify the NRC when that individual accepts a new position that involves work in NRC-licensed activities.

- (a) This notification requirement may apply to the first employment in NRC-licensed activities or may apply for a specified period of time. The purpose of the NRC notification requirement is to:
    - (1) Let wrongdoers know and appreciate that their future activities may be subject to inspection; and
    - (2) Provide the NRC with an opportunity to inspect the functional area in which a former wrongdoer is working.
  - (b) When such a notification is received in a regional office, OE should be consulted to ensure that OE also is aware of the new employment; if OE becomes aware of the information, OE will advise the appropriate region of receipt of that information.
2. For materials licensees, the region (or program office) administering the license of the new employer should insert a notation in the employer's license docket file that notice has been received that a prior wrongdoer is now employed by that licensee.
- (a) This notation should not identify the individual by name.
  - (b) The Regional Enforcement Coordinator will maintain a record of notifications.
  - (c) The note should remain in the file for as long as the order requires notice to the NRC (Notice Period).
  - (d) If the notice requirement applies only to the first employment, the note should remain in the file until the next inspection and then be deleted.
  - (e) If the docket file is made available for public review, the note should be withheld.
3. For reactor licensees:
- (a) OE will notify the NRR Enforcement Coordinator.
  - (b) The NRR Enforcement Coordinator will notify the operator licensing staff in NRR and the plant Project Manager and Senior Resident Inspector (SRI) of the wrongdoer's employment.
  - (c) The NRC should not volunteer or advise the licensee that the prior wrongdoer is employed at its facility. (This is because the order allows the person to be re-employed, and if the NRC notifies the licensee, that information could have the possible effect of suggesting to the licensee that the individual should not be employed.)
4. For both reactor and materials licensees, the region administering the license of the new employer, or program office for those licenses administered by headquarters, should acknowledge the notification in writing.
- (a) The letter to the individual will advise that the agency expects the individual to fully understand the requirements of the license and pertinent regulations, that the NRC

expects full compliance with those requirements, and will routinely inspect that facility in the future.

- (b) This letter would be prepared by the Regional Enforcement Coordinator, with OE concurring.
- (c) This letter would be made available to the public in the same fashion as the letter issuing the initial action, e.g., under the IA number and without the new employer's docket number.


**i. Materials licensees (without resident inspectors):**

1. After learning that a prior wrongdoer has been employed by a licensee in its region:

- (a) The regional office should consider whether the circumstances warrant increasing the inspection frequency or advancing the next scheduled inspection.
- (b) If the licensee is to be inspected during the notice period for that individual, the region should plan to inspect the functional area in which the subject individual is working.

(1) After seeing the note in the docket file, the inspector should check with the Enforcement Coordinator to learn the name of the prior wrongdoer.

(2) To ascertain in what functional area the individual is working, the inspector and the supervisor should discuss ways to identify unobtrusively the functional area in which the subject individual is working, e.g., an inspector could look at an organization chart, staff list, film badge list, or internal telephone directory.

 Inspection of the functional area in which the prior wrongdoer works, is a goal, not a requirement.

(3) The inspector should not do anything that is likely to alert the licensee that a prior wrongdoer is working at the facility and the inspector should not go out of the way to speak with the individual or treat him or her in an unusual manner.

(4) It is acceptable for the inspector to examine the functional area in which the individual works, if that can be identified; however, the inspector should err on the conservative side, and not jeopardize the individual's right to employment if locating the individual is difficult.

(c) The Inspection Report or field notes should not indicate that the inspection focused on the performance of a prior wrongdoer.

(1) Any violations or potential wrongdoing identified during the course of the inspection should be handled in the normal manner, unless it appears that the prior wrongdoer was involved in the violation.

(2) If the prior wrongdoer was involved in the violation, contact OE.

**j. Reactors and other licensees with resident inspectors:**

1. A SRI who has been notified by NRR that a previous wrongdoer is now employed at that facility can often identify unobtrusively the functional area in which the subject individual is working, using sources such as the licensee's telephone directory.
2. During routine inspection activities, the resident should inspect the functional area in which the subject wrongdoer is working. The functional area should be periodically reviewed during the notice period.
3. The Inspection Report should not indicate that inspection activity focused on the performance of a prior wrongdoer.
  - (a) Any violations or potential wrongdoing identified during the course of the inspection should be handled in the normal manner, unless it appears that the prior wrongdoer was involved in the violation.
  - (b) If the prior wrongdoer was involved in the violation, contact OE.